Oct. 18 1876
Mr Butler
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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~242.~~ 47

THE STEAMBOAT ATLAS, HER ENGINES, &c., THE CAMDEN AND AMBOY RAILROAD AND TRANSPORTATION COMPANY, CLAIMANTS, APPELLANTS,

vs.

THE PHŒNIX INSURANCE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

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FILED SEPTEMBER 11, 1875.

Part for Plaintiffs
Nov. 6 1876
Overruled
Jus Bldgforce

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SUPREME COURT OF THE UNITED STATES.

No. 242.

THE STEAMBOAT ATLAS, HER ENGINES, &c., THE CAMDEN AND AMBOY RAILROAD AND TRANSPORTATION COMPANY, CLAIMANTS, APPELLANTS,

vs.

THE PHŒNIX INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

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1 At a stated term of the district court of the United States of America for the eastern district of New York, held at the United States court-rooms in the city of Brooklyn on the 14th day of November, in the year of our Lord one thousand eight hundred and sixty-eight.

Present, honorable Chas. L. Benedict, district judge.

THE PHŒNIX INSURANCE COMPANY
vs.
THE STEAMBOAT ATLAS, HER ENGINES, &C.

The libellants herein appear and file their libel against the above-named vessel, her engines, &c., in the words and figures following, to wit:

2 United States district court, eastern district.

To the honorable Charles L. Benedict, judge of the district court of the United States for the eastern district of New York:

The libel of the Phœnix Insurance Company against the steamboat Atlas, her engine, boilers, tackle, apparel, and furniture, and all persons lawfully intervening for their interest in the same, in a cause of collision, civil and maritime, alleges as follows:

First. That your libellants, before and at the time of the collision hereinafter in the fifth article mentioned, were and ever since have been, and now are, a corporation duly incorporated and existing by and under the laws of the State of New York, and carrying on the business of fire and marine insurance in the said State of New York, and that the said steamboat is now within the jurisdiction of this court and lying in the port of New York.

Second. That your libellants, in the month of March, 1868, by a policy of insurance in the usual form, duly insured the cargo of the canal-boat A. E. Hurd, consisting of linseed, against the usual perils of
3 navigation on a voyage from New York to New Brunswick, in the State of New Jersey, in the sum of nineteen thousand five hundred dollars, whereby said libellants became and were insurers on the said cargo against the risk of navigation on said voyage.

Third. That soon after the said canal-boat A. E. Hurd, with her said cargo on board, was taken in tow, together with another canal-boat and a schooner, by the steam-tug called the Kate, at the said port of New York, and proceeded on said voyage and was taken in safety to New Brighton, Staten Island, when the weather being unfavorable the said tug, with her tow, on the evening of the 17th day of March, 1868, made fast and remained till about three o'clock the next morning, when she again started with her tow for New Brunswick; the position of the said canal-boat A. E. Hurd being abreast of the other two vessels in tow and on the starboard side of the tier, and outside of the tier, and outside all the boats in tow, being towed by hawsers from the stern of the said tug, fastened to the two outside boats of the tier.

Fourth. That the said tug Kate, so leaving said New Brighton, took her course directly for Port Johnson on the Jersey shore, across the Kills, and headed about northwest by north, which course she kept until the moment of the collision hereafter mentioned, the wind then blowing about northeast and tide being on the flood and nearly high-water, and the night stormy and dark.

Fifth. That the said tug Kate proceeded safely with her said tow to

within about one hundred and fifty yards of the Jersey shore, when, at about twenty minutes to four o'clock in the morning, the captain of said tug Kate, being in her pilot-house, heard the whistle of a steamboat apparently dead ahead and about one-tenth of a mile distant. That such whistle was blown once, being the signal that the boats were to pass to the port side of each other; that the captain of the said Kate
4 immediately answered by blowing his whistle twice, (being the signal to keep to the starboard side,) it being unsafe for him, owing to the state of the tide and the conformation of the adjacent shore, to attempt to pass an approaching vessel on her port side, and he accordingly starboarded his helm. That within a minute of the time when the helm of the said Kate was put to starboard, as aforesaid, the approaching steamboat, which proved to be the steam-tug Atlas, with great force and violence ran into and upon the said Kate, striking her about midships on the starboard side, her course having been changed under the influence of her starboard helm to about southeast, staving her in from her plank shear to the third plank below her water-line and making an aperture through which the waters rushed, causing her to sink in about six minutes from the time of the said collision; and at the same time the Atlas, continuing her course, shoved the Kate down upon the boat on the port side of the tier in tow, and the one next to her, and causing a barge which the said Atlas had lashed to her port side to run with great force into and upon the said canal-boat A. E. Hurd, on the starboard side of the tier of boats in the tow of the said Kate, starting her fore-foot and staving in her bow so that she sunk in fifteen minutes from the time of being struck, in about twelve feet of water, whereby her cargo was totally lost and destroyed, and was abandoned by the owners to the libellants, *to* the insurers thereof, as aforesaid.

Sixth. That the said collision was caused by the improper and unskillful management of those in charge of the said steam-tug Atlas; that at the time of the collision, and before it, said Atlas did not at any time exhibit good and sufficient lights, nor all the lights which by law she was required to exhibit. That the said Atlas failed to answer the whistles of the said Kate, and to change her course as she might have done and so have avoided the collision, and did not stop nor back until after she struck the Kate as aforesaid, and then only stopped her
5 engine while she continued to go forward under the influence of her momentum until having produced the said damage to the canal-boat she backed and left, although requested by the captain of the said Kate and other persons to aid in saving the sinking boats, which the captain of the Atlas refused to do.

Seventh. That at the time of the said collision the said Kate was in every respect well manned, tackled, appareled, and appointed, and had the usual and necessary complement of men, and that the master and part of the crew were on deck at the time of the collision, and all the time before, after the Kate and her tow left New Brighton as aforesaid, on the lookout for the protection and safety of the said vessel. That all the lights required by law were on the Kate brightly burning, and were all good and sufficient lights as required by law. That the said canal-boat A. E. Hurd was at the time of the said collision also tight, staunch, and strong, and well manned and appointed in every respect, and also had a bow-light burning before and at the time of the said collision.

Eighth. That the said collision was caused, as libellants are informed and believe and therefore charge, by and through the faults, negligence,

mismanagement, and want of skill of those on board of and navigating the said steam-tug Atlas, and no fault of the said Kate or those on board of her, or of the said canal-boat A. E. Hurd, which was entirely helpless.

Ninth. That by reason of the said collision, and *that* the loss and abandonment of the cargo on board the said canal-boat A. E. Hurd, the libellants became responsible and liable to pay as insurers as aforesaid upon the aforesaid policy of insurance so insured by them as aforesaid, to wit, in the sum of nineteen thousand five hundred dollars, and which these libellants have duly paid, and these your libellants are now, by reason of the premises aforesaid, entitled to demand of and from
6 the said steam-tug Atlas the sum of eleven thousand nine hundred and sixty-five dollars, with interest thereon from the day of , 1868.

Tenth. That all and singular the premises are true and within the admiralty jurisdiction of this honorable court.

Wherefore libellants pray that process in due form of law, according to the course of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the said steam-tug or steamboat Atlas, her engines, boilers, tackle, apparel, and furniture; and that all persons having any interest therein may cited to appear and answer all and singular the matters aforesaid, and that this honorable court would be pleased to decree the payment of the damages aforesaid, and that the said steamboat Atlas may be condemned and sold to pay the same, and that the libellants may have such other and further relief as in
7 law and justice they may be entitled to receive.

STEPHEN CROWELL.

Sworn to before me this 14th day of November, 1868.

SAMUEL T. JONES,
U. S. Commissioner.

BARNEY, BUTLER & PARSONS,
Proctors for Libellants.

(Endorsed:) U. S. district court, E. dist. of New York. The Phœnix Insurance Company vs. the Steamboat Atlas, her tackle, &'. Libel. Barney, Butler & Parsons, proctors for libellants. Filed November 14th, 1868.

8 *Stipulation for libellants' costs, entered into pursuant to the rules and practice of this court.—Filed the 14th day of November,* 1868.

District court of the United States for the eastern district of New York.

Whereas a libel was filed in this court, on the 14th day of November, in the year of our Lord one thousand eight hundred and sixty-eight, by the Phœnix Insurance Co. against the S. boat Atlas, her tackle, &c., for the reasons and causes in the said libel mentioned, and praying that said steamboat may be condemned, &c., and the said libellant and A. F. Hastings, surety, the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the libellants or their surety, execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be,
9 and each of them is, bound in the sum of two hundred and fifty

dollars, conditioned that the libellants above named shall appear and answer to the cause and to interrogatories, and shall pay all such costs as shall be awarded against them by this court, or, in case of appeal, by the appellate court.

A. T. HASTINGS.
PHŒNIX INSURANCE COMPANY,
By STEPHEN CROWELL, *President.*

Taken and acknowledged this 14th day of November, 1868, before me.
SAMUEL T. JONES,
U. S. Commissioner.

EASTERN DISTRICT OF NEW YORK, *ss:*

A. T. Hastings, one of the parties to the above stipulation, being duly sworn, doth depose and say that he resides in the city of New York, at 120 Madison ave.; that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

A. T. HASTINGS.

Sworn to this 14th day of November, 1868, before me.
SAMUEL T. JONES,
U. S. Commissioner.

10 EASTERN DISTRICT OF NEW YORK, *ss:*

The President of the United States of America to the marshal of the eastern district of New York, greeting:

Whereas a libel hath been filed in the district court of the United States for the eastern district of New York, on the 14th day of November, in the year of our Lord one thousand eight hundred and sixty-eight, by the Phœnix Insurance Company against the steamboat Atlas, her engines, boilers, tackle, &c., for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said steamboat or vessel, her tackle, &c., may be cited, in general and special, to answer the premises, and all proceedings being had, that the said steamboat or vessel, her tackle, &c., may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellants.

You are therefore hereby commanded *at* attach the said steam-
11 boat or vessel, her tackle, &c., and to detain the same in your custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the eastern district of New York, on the 2nd day of December, 1868, at noon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf; and what you shall have done in the premises, do you then and there make return thereof, together with this writ.

Witness the honorable Charles L. Benedict, judge of the said court, at the city of Brooklyn, in the eastern district of New York, this 14th day of December, in the year of our Lord one thousand eight hun-
12 dred and sixty-eight, and of our Independence the ninety-third.

SAMUEL T. JONES, *Clerk.*

BARNEY, BUTLER & PARSONS,
Proctors for Libellants.

In obedience to the within monition I attached the steamboat Atlas, her engines, boilers, &c., therein described, on the 16th day of November, 1868, and have not given due notice to all persons claiming the same, that this will, on the 2nd day of December, 1868, inst., at 12 o'clock noon, if that day should be a day of jurisdiction, if not, on the next day of jurisdiction, thereafter proceed to the trial and condemnation thereof should no claim be interposed for the same.

FRANCIS L. DALLON,
U. S. Marshal.

(Endorsed:) Eastern district of New York. United States district court. The Phœnix Insurance Company vs. the Steamer Atlas, her engines, &c. Monition ret'ble December 2nd, 1868. Barney, Butler & Parsons, proctor' for libel'ts. Filed December 2nd, 1868.

I hereby depute M. F. Brenan or L. C. Nodine to execute the within process.

Dated Nov. 14, 1868.

FRANCIS L. DALLON,
U. S. Marshal.

13 At a stated term of the district court of the United States of America for the eastern district of New York, held at the United States court-rooms in the city of Brooklyn on the 28th day of November, in the year of our Lord one thousand eight , present, the honorable Charles L. Benedict, district judge.

THE STEAMBOAT ATLAS, HER ENGINES &C., *ads.* THE PHŒNIX INSURANCE COMPANY.

And now George B. Raymond, agent of the owners of the steamboat Atlas, &c., intervening for the interest of the Camden and Amboy Railroad and Transportation Company, owners of the said steamboat Atlas, &c., appears before the honorable court and makes claim to the said steamboat, &c., as the same are attached by the marshal, under process of this court, at the instance of the Phœnix Insurance Company,
14 and the said George B. Raymond, agent as aforesaid, avers that said steamboat Atlas, her engines, &c., was in possession of the said owners at the time of the attachment thereof, and that the corporation above named are the true and bona-fide owner of the said steamboat, and that no other person is the owner thereof; wherefore they pray to defend accordingly.

GEO. B. RAYMOND,
Agent Camden & Amboy R. Road & Trans. Co.

Sworn to and subscribed this 20th day of November, A. D. 1868, before me.

CHAS. W. NEWTON,
U. S. Commissioner.

(Endorsed:) U. S. district court, E. dist. of New York. The S. B. Atlas, her tackle, &c., ads. the Phœnix Ins. Co. Sanford & Woodruff, proctors for claimant. Claim of owner. Filed the 28th day of November, 1868.

15 *Stipulation.*

District court of the United States for the eastern district of New York.

Whereas a libel was filed in this court on the 14th day of November, in the year of our Lord one thousand eight hundred and sixty-eight, by

the Phœnix Insurance Company, libellants, against the steamboat Atlas, her engines, &c., respondents, for the reasons and causes in the said libel mentioned, and praying that said steamboat may be condemned and sold, and the parties hereto hereby consenting that, in case of default or contumacy on the part of the claimants or their surety, execution for the sum of two hundred and fifty dollars may issue against their goods, chattels, and lands;

And whereas, also, a claim has been filed in said cause by the Camden and Amboy Railroad and Transportation Company, through their agent, George B. Raymond:

Now, therefore, it is hereby stipulated and agreed, for the bene-
16 fit of whom it may concern, that the stipulators undersigned shall be, and each of them is hereby, bound in the sum of two hundred and fifty dollars, conditioned against the claimants above named shall pay all costs and expenses which shall be awarded against *the claimants above named shall pay all costs and expenses which shall be awarded against* them by the final decree of this court, or, upon an appeal, by the appellate court.

GEO. B. RAYMOND,
Agent Camden & Amboy R. R. and Trans. Co.
MOSES TAYLOR.

Taken and acknowledged this 20th day of November, 1868, before me.
CHAS. W. NEWTON,
U. S. Commissioner.

EASTERN DISTRICT OF NEW YORK, *ss:*

Moses Taylor, party to the above stipulation, being duly sworn, doth depose and say that he resides in the city of New York; that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

MOSES TAYLOR.

Sworn to this 28th day of November, 1868, before me.
CHAS. W. NEWTON,
U. S. Commissioner.

17 *Stipulation for value.—Filed the 28th day of November*, 1868.

District court of the United States for the eastern district of New York.
In admiralty.

Whereas a libel was filed on the 14th day of November, in the year of our Lord one thousand eight hundred and sixty-eight, by the Phœnix Insurance Company, libellants, against the steamboat Atlas, her engines, &c., respondents, for the reasons and causes in the said libel mentioned; and whereas the said steamboat Atlas, her engines, &c., has been attached and is now in the custody of the marshal, under the process of this court issued in pursuance of the prayer of said libel; and whereas a claim to said vessel has been filed by the Camden and Amboy Railroad and Transportation Company, and the value thereof has been fixed by consent at $15,000.00 dollars, as appears from said consent now on file in said court; and the parties hereto hereby consenting and agree-
ing that, in case of default or contumacy on the part of the claim-
18 ants or their surety, execution for the above amount, with interest from this date, may issue against their goods, chattels, and lands:

Now, therefore, the condition of the stipulation is such that if the stipulator undersigned shall at any time upon the interlocutory or final order or decree of the said district court or of any appellate court to which the above-named suit may proceed, and upon notice of such order or decree to Sandford & Woodruff, esquires, proctors for the claimants of said steamboat, abide by and pay the money awarded by the final decree rendered by the court, or the appellate court if any appeal intervene, then this stipulation to be void; otherwise to remain in full force and virtue.

CAMDEN & AMBOY R. R. & TRANS. CO.,
By GEO. B. RAYMOND, *Agent.*
MOSES TAYLOR.

Taken and acknowledged this 28th day of November, 1868, before me, by Moses Taylor.

CHAS. W. NEWTON,
U. S. Commissioner.

EASTERN DISTRICT OF NEW YORK, *ss:*

Moses Taylor, party to the above stipulation, being duly sworn,
19 deposes and says that he resides in the city of New York; that he is worth the sum of thirty thousand dollars over and above all his just debts and liabilities.

MOSES TAYLOR.

Sworn to this 28th day of November, 1868, before me.

CHAS. W. NEWTON,
U. S. Commissioner.

I approve of the form and sufficiency of the within bond, and consent to the discharge of the steamboat Atlas.

N. Y., Nov. 28th, 1868.

BARNEY, BUTLER & PARSONS,
Proctors for Libellants.

20 *Notice to marshal.*

United States district court.

THE PHŒNIX INSURANCE COMPANY, LIBLTS.,
vs.
THE S. B. ATLAS, HER ENGINES, &C.

SIR: The above steamboat having been bonded and the costs of the clerk having been paid, you will discharge the said steamboat from your custody on payment of your fees.

Dated November 28th, 1868.

Yours, &c.,

SAMUEL T. JONES, *Clerk.*

To FRANCIS L. DALLON, *U. S. Marshal.*

21 To the honorable Charles L. Benedict, judge of the district court of the United States for the eastern district of New York.

The answer of the Camden and Amboy Railroad and Transpor-
22 tation Company, owners of the steam-tug Atlas, intervening for their interest therein, to the libel of the Phœnix Insurance Company, answers and alleges as follows:

First. That these respondents are ignorant of the matters contained

in the first and second articles of said libel, (except such part of said first article as alleges the jurisdiction of this honorable court over said steam-tug Atlas,) and also of the matters contained in the third, fourth, and ninth articles thereof, (except so much of said third, fourth, and ninth articles as is hereinafter admitted or denied,) and as to the matters contained in the fifth article of said libel they allege that the same are for the most part falsely alleged, and that the truth is as is hereinafter alleged.

Second. That on the morning of the eighteenth day of March, one thousand eight hundred and sixty-eight, said steam-tug Alas was proceeding on her regular trip from Amboy, in the State of New Jersey, to the city of New York, on an easterly course through the Kills, having the barge Julia in tow and lashed to the port side of said steam-tug.

That at about half-past three o'clock, when said steam-tug Atlas was near the Copper Dock, and being at that time in the middle of the river, the officers of said Atlas discovered a single white light nearly dead ahead; that seeing no other light they supposed it belonged to a vessel going in the same direction with said steam-tug.

That thereupon the pilot of the Atlas immediately blew his whistle once (as a signal that the steam-tug would pass to the right) and ported his helm, and the light was then seen to belong to a tow.

That the tow appeared to be running straight with the river, being also in the middle of the river and bearing a little over the larboard bow of the Atlas.

That shortly afterwards two whistles were sounded from the tow, which indicated that they were attempting to cross the bows of the Atlas and pass on the starboard side.

23 That thereupon the captain of the Atlas, who was at the time in the pilot-house, immediately rang the bell, thereby giving the necessary signals to the engineer to back quickly, and shouted to the captain of the barge Julia, who was at her wheel, to starboard his helm, which orders were immediately executed, and the pilot of the Atlas also immediately put his wheel to starboard. But that before the headway of the Atlas was stopped, her bows came in contact with the tug Kate, in said libel mentioned, striking the Kate on the starboard side aft of her centre, the blow ranging toward the stern of the Kate.

That the tug Kate and the Atlas then slid alongside of each other on their starboard sides, and the bows of a schooner (being the middle one of a tier of three vessels towed astern of said Kate, one of which said vessels was, as these respondents are informed, the canal-boat A. E. Hurd in said libel mentioned) struck the larboard bow of the barge Julia, and then with the other boats of said tow swung round onto the larboard side of said barge and said Atlas.

That the headway of said Atlas was then stopped and she began immediately moving astern.

That as soon as the Atlas and barge were clear of said tow they stopped, and both the Kate and her tow floated round onto the larboard side of the barge.

That thereupon the captain of the Atlas, it being impossible to see by reason of the darkness of the night whether any damage had been sustained by the Kate or her tow, directed the captain of the barge to enquire if they required any assistance; that he did so, calling aloud to them three successive times, with a considerable interval between each call, and no answer was returned.

That the captain of the Atlas therefore supposed that no serious damage was done and no help desired, and directed the Atlas to proceed on

her trip, which she did, passing to the right and south of said Kate and her tow.

That these respondents have no knowledge how the alleged in-
24 jury to the canal-boat A. E. Hurd was received, and did not know that she had been injured until the following day, and deny that her cargo was wholly lost and destroyed as alleged in said libel.

Third. And these respondents deny that said collision or the injury alleged in said libel was caused by the improper and unskilful management of those in charge of said steam-tug Atlas, or that at the time of said collision and before it said Atlas did not exhibit good and sufficient lights and all the lights which by law she was required to exhibit.

And they further deny that she could have changed her course after the whistles of the Kate were blown, or could have avoided said collision, or that the Atlas did not reverse her engine until after she struck said Kate, or that her engine was then only stopped, or that any assistance was asked of the captian of the Atlas or of any one, to his knowledge, or that he refused to aid them; all of which is falsely alleged in the sixth article of said libel.

But, on the contrary, these respondents aver and insist that the persons in charge of said Atlas used the utmost care, skill, and caution in her management; that as soon as they discovered the lights ahead they endeavored to pass to the right, as they were bound by law to do; that they immediately gave the necessary signal by blowing one whistle to indicate their design so to do, and as a warning to the vessel or vessels ahead; that when the two whistles were blown by the Kate, it was then too late to alter the course of *of* the Atlas or to pass the Kate and her tow on the starboard side, but that the Atlas immediately did all that it was possible for her to do to avoid the collision by reversing her engine and starboarding her helm; that the Atlas was stopped and backed as quickly as was possible after the signal from the Kate; and that the wheels of the Atlas were moving backward continuously from the moment that the two whistles were blown by the Kate until after the collision with the tow.

25 And these respondents further aver that said steam-tug Atlas carried six lights, namely, two bright lights forward, two bright lights aft, one red light on the larboard wheel-house, and one green light on the starboard wheel-house.

That said lights were all brightly burning at the time of said collision and could be easily seen at a great distance; and that the barge Julia also had a bright light high on her mast.

Fourth. These respondents deny that at the time of said collision the said Kate was in every respect well manned, apparelled, and appointed, or that she had the usual and necessary complement of men, or that all the lights required by law were on the Kate brightly burning and were all good and sufficient lights as required by law, as is falsely alleged in the seventh article of said libel.

But, on the contrary, the respondents aver and insist that the said Kate had not, at the time of said collision, the necessary and proper complement of men, and especially that her pilot was not a fit and competent person to manage said tug, and was not licensed, as required by law.

And these respondents further aver that said tug Kate and her tow were improperly, insufficiently, and negligently lighted, and did not carry the lights required by law, and which they were bound to do. And that only one light was visible upon said tug Kate or her tow when the vessels were first discovered, or at any time afterward.

Fifth. And these respondents deny that said collision was caused by or through any fault, negligence, mismanagement, or want of skill on the part of those on board of and navigating said steam-tug Atlas or the barge Julia; and further deny that those on board said Kate were guilty of no fault, as is falsely alleged in the eighth article of said libel.

But, on the contrary, these respondents aver and insist that
26 said collision was occasioned solely by the fault, negligence, and mismanagement of the persons in charge of said tug Kate, and her tow, in not keeping to the right and passing the Atlas on her port side, as the law directs, and as they might and should have done; in not giving ample notice of the intention of said tug Kate and her tow to pass on the starboard side, and in attempting to cross the bows of the Atlas when in such proximity; in having an incompetent and unlicensed pilot in charge of said Kate; in not exhibiting proper and sufficient lights, so that the character, course, position, and distance of said tug Kate and her tow could be accurately determined, and in not taking other and needful precautions to prevent said collision, and in so improperly conducting said tug Kate and her tow that the collision could not possibly be avoided by these respondents.

Sixth. And these respondents further aver that it was dark at the time of the collision, but that good lights could be distinctly seen at a great distance, and that the wind was about south-southwest. And they further aver that there was ample room and no difficulty or danger whatever in the tug Kate and her tows passing said Atlas on the port side; that had the Kate kept to the right the collision would not have occurred; or had the tug Kate and her tow kept the position in which they were when first discovered, the Atlas would have passed them in safety; but that when the whistles of the Kate were blown, it was impossible for the said steam-tug Atlas to change the course which the law directs, and pass to starboard of the Kate and her tow.

And these respondents deny that they are liable to these libellants, or to any one, for the damage resulting from said collision, or for any sum whatever by reason thereof.

Seventh. That all and singular the premises are true.

Wherefore these respondents pray that this honorable court would be pleased to pronounce against the libel aforesaid, and to condemn
27 the libellants in costs and expenses, and otherwise law and justice to administer in the premises.

GEO. B. RAYMOND, *Agent.*

Sworn to before me this 15th day of December, 1868.

JOSEPH GUTMAN, JR.,
U. S. Commissioner, S. D. N. Y.

(Endorsed:) U. S. district court, eastern district of New York. The Phœnix Insurance Company vs. the Steamboat Atlas, her engines, &c. Answer. Sanford & Woodruff, proctors for respondents. Filed December 16th, 1868.

At a stated term of the district court of the United States of America for the eastern district of New York, held at the United States court-rooms in the city of Brooklyn on the 30th day of April, in the year of our Lord one thousand eight hundred and sixty-nine—present, the Hon. Charles L. Benedict, district judge.

THE PHŒNIX INSURANCE CO.
vs.
THE STEAMBOAT ATLAS, &C.

Cause called. Counsel ready. Trial ordered to proceed.
Mr. Stillman read libel.
Mr. Woodruff read answer.

Evidence for libellants:

William Conley—depositions read.
28 Ferdinand Read sworn and examined.
Benjamin F. Taylor sworn and examined.
John M. Sterry sworn and examined.
James H. Read sworn and examined.
Libellants rest.

George M. Gillings sworn and examined for claimants. Hearing suspended until May 3, 1869, at 10½ a. m.

MAY 3, 1869.

Hearing continued.

Evidence for claimants:

William Durham sworn and examined.
William J. Parrisen sworn and examined.
James W. McKenna sworn and examined.
Benjamin Pancost sworn and examined.
George R. Schenck sworn and examined.
Charles S. Thorpe sworn and examined.
Robert Walker sworn and examined.
L. P. Culver sworn amd examined.
Thomas N. Vanderbilt sworn and examined.
Claimants rest.

G. Mayer sworn and examined by libellant.
Ferdinand Read recalled by libellant.
Benjamin F. Taylor recalled by libellant.
James H. Read recalled by libellant.
Testimony closed. Summing up of cause adjourned to a day to be fixed hereafter.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that on this 24th day of April, in the year of our Lord one thousand eight hundred and sixty-nine, I, Edward L. Owen, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit,
29 under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, No. 72 Wall street, in the city of New York, in

the said southern district of New York, in the State aforesaid, William Conley to testify and the truth to say on the part of the libellants in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the eastern district of New York at Brooklyn, the Phœnix Insurance Company is libellant, and the steamboat Atlas, her engines, &c., is claimant.

And thereupon the said WILLIAM CONLEY, having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said William Conley, and he did thereupon depose, testify, and say as follows, viz:

I am 38 years of age. I am a sea-faring man, and reside at Castine, Maine, and expect to go to sea soon. On the 17th day of March, 1868, I was on board the schooner General Cazusan, which was lying at Atlantic Dock. I was captain of that schooner. The tug-boat Kate came after my schooner about 5 p. m. of that day and took me in tow; she had no other boats in tow at that time. She took me to pier 12 East River, and then she took one boat loaded with flaxseed, the Hurd; then she took a light boat, the Tracey; then we proce'ded on our way to New Brunswick, in tow of the Kate. When we left New Brighton the light boat was on the port side, the schooner in the middle, and the Hurd was on the starboard side. We were towed by a hawser—by two hawsers
30 bridled—that is, one hawser was on the starboard bow of the schooner to the Kate, and one from the Tracey to the Kate, right straight ahead. The Hurd was fastened by lines to the schooner with what we call a bridle to my hawser, to keep her from sheering. The tow was made up strongly and well secured. They remained fastened to the Kate in that way up to the time of the collision. The hawsers were about thirty fathoms long; I never saw it measured; I presume it was that. We proceeded from pier 12 to New Brighton, Staten Island, where we arrived between 9 and 10 in the evening. We made fast to the dock and remained there until about 2½ a. m., but did not notice the dock. The captain of the Kate notified us that it was about time to start, whereupon we proceeded heading for the northern shore towards a place called Port Johnson. I cannot say whether the lights of the Kate were up when we started. The mast-head light was up. I had a light on my schooner eighteen feet above my deck; it was a French lantern; it was a good, bright light. After leaving the dock we proceeded on our way from twenty to twenty-five minutes, when I heard one whistle which came from the steamboat that run into us, the Atlas; it was answered from the steamboat Kate as quick as could be by two whistles. I then heard the Kate ring her bells, one bell and then two, and the next time there were three or four, but as they were all mixed up, I could not tell exactly how many. I did not hear any answering whistle to the Kate's two whistles. If the Atlas had blown her whistle I would have heard it. Immediately I heard a crash. The Kate changed her course before the crash, and after she had blown her two whistles, from heading up the river to heading across to Staten Island. The tow had not yet changed its course until the time of the collision, and the change of the Kate was made at the instant before the collision. The Atlas struck the Kate on the starboard side, about abreast the engine-room. I cannot tell whether she struck her head on or with the bluff of the bow. The Kate sunk in about three or four minutes after the collision. I did not
31 see the Hurd struck, but I heard a second smash. That smash was not on the Kate; it was on the flaxseed boat. I don't know for certain what struck the Hurd. When I got forward I saw a boat on

the port side of the Atlas in contact with the Hurd. This was right away after the smash. The men on the Hurd, with the assistance of one of my men, tried to get the hatches of the Hurd off, but they did not succeed as she was making water so fast; she sunk before they could get the hatches off. I was on the deck of my boat all the time after leaving New Brighton until the time of the collision, walking fore and aft the deck. The night had been dark and stormy, but about the time of the collision it was beginning to clear up so that we could see both shores. At the time of the collision we were about a quarter of a mile from the Jersey or north shore; this was ahead of our bows and off our starboard side; it, the shore, was about an eighth of a mile. I saw a white mast-head light on board the Atlas; I did not see either a red or green light. When I heard the whistle blown, I looked ahead for lights. I saw a small mast-head light, but saw no other. I did not see the Atlas until I heard the whistle. In looking ahead I saw lights of boats at anchor in Port Johnson, and this light of the Atlas looked like the rest of them. I could not tell by the light whether the Atlas was under way or not, until she blew the whistle. After the collision, the Atlas proceeded on her way; she did not to my knowledge lay by, and I had a fair chance to see if she did. I heard the hail from the Kate, but what it was I cannot tell; it was after the collision.

Cross-examined by Mr. Woodruff:

I know the hail was from the Kate, because I could look down upon her. I don't know what was said. The Kate at the time of the hail was off the port bow of the Tracey. The Atlas was on the starboard side of the Kate at the time I heard the hail. When we left pier 12 the Kate was ahead, and the Tracey and schooner were lashed together, and the loaded boat was made fast to the schooner's stern by a
32 bridle from the stern of the schooner to the stern of the Tracey; this was towing to Brighton; we changed at New Brighton because we towed better. It was Captain Reed's idea that we would tow better. We stopped at New Brighton on account of head tides. Captain Reed called the place we were heading for Port Johnson. I am not familiar with the Kills, and the only way that I know we were heading for Port Johnson was because they said we were. I judge that before the collision we were heading up the river west by north. The Kate had a mast-head light when we left New Brighton, but whether it was burning at the time of the collision I will not say. I do not know how the tug-boat Kate was manned; at the time of the collision I was walking fore and aft the deck. I did not see any one on board the Kate until the collision had happened. My light was burning at the time of the collision, and it was taken down by my orders at six o'clock the next morning. When I heard the single whistle it seemed to come from right ahead; the Kate was between me and the whistle I heard. The vessel that blew the single whistle was very close to us when it blew. I judged that the bells that I heard were from the Kate, as she was the nearest; they were from one or the other of the boats. When I heard the first crash I sung out to my man to heave the wheel hard aport and went right forward; the second crash came just before I got forward. When I got forward the Atlas and other boats were in collision; while I was letting my anchor go, which was a space of three minutes, on looking up the Atlas was gone. I don't know which side of us the Atlas passed. I could see both sides of the river; at the time of the collision we were about two-thirds of the distance over towards the New Jersey shore. I don't remember how the wind was at the time of the collision; it was from southward and eastward before the collision, that is, early

in the evening. I did not see any lights on the Atlas except the little white light; I should probably have seen them if there had been any there. I had no conversation with any one before the collision.

33 Redirect:

We distinguished the place called Port Johnson from other places on the shore by the lights of vessels lying there. After I left New Brighton I noticed the white light on the Kate, the last time about five minutes before I heard the whistle, to the best of my judgment, and then it was burning.

Recross-examination:

I do not know anything about the depth of water or the formation of the shore.

WM. CONLEY.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Edward L. Owen, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, the witness is material and necessary in the cause in the caption of the said deposition named; and that he is a sea-faring man, and is about to go to sea and more than 100 miles from the place of trial.

I further certify that due notification of the time and place of taking the said deposition, signed by me, was made out and served on the proctors for the claimant to be present at the taking of the deposition and to put interrogatories, if he or they might think fit, and that on the 24th day of April, in the year of our Lord one thousand eight hun-
34 dred and sixty-nine, I was attended by the counsel for the respective parties and by the witness, who was of sound mind and lawful age, and the witness was by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition was by me reduced to writing in the presence of the witness and from his statements, and after carefully reading the same to the witness he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of transmitting the same with my own hand to the court for which the same was taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof I have hereunto set my hand and seal this 24th day of April, in the year of our Lord one thousand eight hundred and sixty-nine, and of the Independence of the United States the ninety-third.

EDWARD L. OWEN,
United States Commissioner.

U. S. district court, eastern district of New York.

THE PHŒNIX INSURANCE CO.
vs.
THE STEAMBOAT ATLAS, HER TACKLE, &C.

Before Hon. Judge Benedict, Friday, May 30, 1869.

Mr. Stillman read the libel, and Mr. Woodruff read the answer.

Mr. Stillman put in evidence the deposition of William Conley and read the examination-in-chief.

Mr. Woodruff read the cross-examination.

35 FERDINAND REED called for libellants and sworn.

Examined by Mr. Stillman:

Q. What is your business?

A. Pilot of the steamboat Kate.

Q. Are you a licensed pilot?

A. Yes, sir.

Q. Where were you on the 17th of March, 1868?

A. I came into New York in the afternoon.

Q. Did you take any boats in tow that day?

A. Yes, sir.

Q. State what boats.

A. The schooner General Gazneau; a Schuylkill boat, the James Tracey; and lake boat, the A. E. Hurd.

Q. Where did you leave with those boats?

A. I think it was pier No. 8, East River. I started about 6 o'clock, and towed them towards New Brunswick.

Q. Where did you go that night?

A. To New Brighton.

Q. What time did you get there?

A. About 10 o'clock.

Q. Did you do anything with your tow at New Brighton; and, if so, what?

A. I had the barge A. E. Hurd under the schooner's stern, and hauled her up on the starboard side of the schooner, so as to have them three abreast. The light boat was not changed at New Brighton; she lay inside of the Hurd and of the schooner, nearer to the dock.

Q. How were those boats fastened to the Kate?

A. With two hawsers thirty fathoms long.

Q. Where did those hawsers lead from?

A. From the stern of the Kate to the bows of the A. E. Hurd and the bow of the James Tracey, and bridled to the bow of the schooner.

Q. How long were the hawsers?

A. They were thirty-seven fathoms long and I had thirty fathoms out clear of the stern.

Q. How long did you lie at New Brighton?

A. About five hours.

Q. What time did you leave?

36 A. About a quarter past three the next morning.

Q. Were your lights burning when you left New Brighton

A. Yes, sir.

Q. All of them?

A. Yes, sir.

Q. (By the Court.) How was the wind?
A. When we left New Brighton it was about northeast.
Q. How was the tide?
A. The tide wanted about an hour and a half of being high water.
Q. (By Mr. Stillman.) What course did you take?
A. After we pulled clear of the docks we took about north of west.
Q. What place did you head for?
A. Port Johnson; not exactly Port Johnson, but about between Constable Point and Port Johnson.
Q. How wide is the river directly across the Kills?
A. It is not much, if any, over a quarter of a mile from New Brighton down to the copper dock.
Q. State now in detail everything that happened from the point you have reached until the time of the collision.
A. After we left the dock we proceeded about across the Kills, a little quartering and running up. When we got about two-thirds of the way over, I heard one whistle. I saw no side lights; no colored lights at all. I saw a kind of a mast bearing down upon us and I blowed two whistles. The flood tide was carrying my tow up towards Staten Island shore as fast as we were pulling across. I immediately starboarded my wheel, stopped and backed, and lay still, when I found that she would not answer my two whistles.
Q. How far off was she when you heard her one whistle?
A. About one-eighth of a mile, I should judge.
Q. How fast were you going at the time?
A. About two knots and a half an hour; not much faster than the tide.
Q. How large is the Kate?
A. Fifty feet long, fourteen wide, and draws six and a half feet of water.
Q. How far were you from the Jersey shore when this whistle was blown?
37 A. From 150 to to 175 yards.
Q. How long an interval elapsed between the time when you heard their whistle and the time when you blew yours?
A. I blew mine in an instant.
Q. State why you blew two whistles.
A. Because I could not get across her bow with my tow.
Q. This mast that you saw was on which bow of the Kate?
A. On our starboard bow.
Q. Did you see the lights of any other vessels beyond the Atlas?
A. Yes, sir. There were vessels anchored all along shore up to Port Johnson.
Q. What direction did Port Johnson bear from you?
A. I cannot tell exactly.
Q. Was it off either bow, or right ahead?
A. It was off our starboard bow.
Q. Was any answer made to your two whistles?
A. No, sir.
Q. How soon after the two whistles were blown did the collision occur?
A. About a minute.
Q. How did the Atlas strike your boat?
A. She struck us amidships, head on.
Q. What was the position of the tow at the time the Atlas struck your boat?
A. They hung a little off to our port hand, the tide setting then over that way towards Staten Island.

Q. Do you know how the Hurd was struck?
A. I do not.
Q. Do you know what struck her
A. The barge must have struck her, for the Atlas was in the Kate when the Hurd was struck.
Q. Were you badly damaged?
A. Yes, sir.
Q. So that you sunk?
A. So that we sunk in about five or ten minutes.
Q. Did you make any hail to the captain of the Atlas to do anything for you?
38 A. Yes, sir. As soon as I found we were sinking I hailed him and asked him if he would not shove us ashore.
Q. What reply did he make?
A. He did not make any reply.
Q. How long did the Atlas remain there?
A. Not over two minutes. As soon as she could back off and go on, she did so.
Q. You got off the Kate before she sunk. What boat did you get on?
A. The schooner Gazneau.
Q. Where was the Gazneau in relation to your boat?
A. She lay anchored a little in shore of us.
Q. Then her port was against your port and her bow towards your stern?
A. No, sir. She laid to and anchored inside of us after we sunk.
Q. At the time you got off the Kate on to her how did she lie?
A. I got off the Kate into a small boat.
Q. At that time where was the Hurd in relation to your boat?
A. She laid inside, towards the Jersey shore.
Q. What time was it when the collision took place?
A. Our clock stopped at twenty minutes to four.
Q. Was your clock going before the collision?
A. Yes, sir.
Q. Where was it?
A. It was in the cabin.
Q. What light did you see on the Atlas?
A. A spar-light and a red light.
Q. Did she have any side lights up?
A. No, sir.
Q. Did you look particularly to see?
A. Yes, sir. If she had I would have seen them.
Q. What kind of lights were her spar-lights—as to being bright or dim?
A. It was not a very bright light, but it was bright enough to be seen among the vessels as she was coming down. You would take it to be a vessel anchored.
39 Q. Had you seen that light before you heard the whistles?
A. I had seen lights up there, but not that one in particular. I had seen many more.

Cross-examined by Mr. Woodruff:

Q. How old are you?
A. Going on twenty-six.
Q. How long have you followed the water?
A. Eight years.
Q. In what capacity have you been occupied during that time?

A. I was a deck-hand five years.
Q. On what sort of a vessel?
A. I have been on steamboats all that time.
Q. How have you been occupied during the last three years?
A. I had part charge of a boat one year, and I have had charge of the tug Kate for two years.
Q. You were the pilot and master of the Kate?
A. Yes, sir.
Q. When you started from New York on that occasion you had three vessels in tow?
A. Yes, sir.
Q. How were they taken or secured in tow?
A. By two hawsers.
Q. That was done at New York?
A. Yes, sir.
Q. Describe the order in which the boats were arranged.
A. The schooner and the light boat were side and side ahead, and the A. E. Hurd under their stern, fastened by one tow-line between the two head boats, and a guy-line from the port quarter of the light boat to the starboard quarter of the schooner.
Q. You changed that arrangement at New Brighton. What did you change for?
A. I hauled them up so as to have them all abreast. The A. E. Hurd was cutting and shearing under their stern.
40 Q. Then you thought that a better way to tow the boats?
A. Certainly.
Q. Do you consider that the way you came from New York was a proper way to tow a loaded boat?
A. It was perfectly safe. The schooner was drawing more water than the A. E. Hurd.
Q. Was any objection made to the manner in which the boats were being towed?
A. No, sir.
Q. Did the captain of the Hurd object to the manner in which he was being towed?
A. No, sir; not that I heard of; not to me.
Q. Then you changed the order in which the boats were being towed of your own motion and without the suggestion of anybody else?
A. Yes, sir.
Q. Where have you been employed for the greater part of the time since you have been in command of that boat; in what waters?
A. Between New Brunswick and New York.
Q. Running through the Kills?
A. Yes, sir; ever since I commenced steamboating.
Q. When you left New Brighton had you then made the change in the position of the vessels that you were towing?
A. We made the change the night we stopped there.
Q. How much hawser did you have out in those boats?
A. Thirty fathoms.
Q. When did you get straightened out?
A. As we left the dock.
Q. Did you make any change in the hawsers after you left New Brighton?
A. No, sir.
Q. Did you pay out any more hawser?
A. No, sir.

Q. Where is Constable Point?

A. Right at the end of the Kills, abreast of New Brighton. It is the last point in the Kills.

41 Q. Where were you in the Kills when you first discovered the light ahead that you speak of as being on the Atlas?

A. Almost opposite the copper dock.

Q. Whither is the copper dock, above or below New Brighton?

A. A little above—westward.

Q. Did you hear the whistle or see the light first?

A. I did not distinguish that light from any other until I heard the whistle.

Q. When you heard the whistle how far had you got across the Kills from the Jersey shore?

The COURT. How far had you got across from the Staten Island shore?

A. Half or two-thirds the way from the Staten Island shore.

Q. From what direction did the sound of the whistle seem to come?

A. Up the Kills; off our starboard bow.

Q. Your attention was then called to this light?

A. Yes, sir.

Q. How far off was the light at that time?

A. You can't very well tell in the night-time, but I should judge about one-eighth of a mile.

By the COURT. What do you call "up the Kills?"

A. Towards New Brunswick.

Q. Then how was it off your starboard bow and at the same time up the Kills?

A. If it had been off our port bow it would have been towards Staten Island, but that was on the Jersey shore.

Q. You were not heading across, then, as much as I thought?

A. Not directly across; we were heading up.

By Mr. Woodruff:

Q. How was your boat manned?

A. She had an engineer, a fireman, a deck-hand, and myself. The engineer was John M. Sterritt, the fireman Benjamin F. Taylor, and the deck-hand James H. Reed.

Q. Where were you standing at the time you heard this whistle?

A. At the wheel.

42 Q. Was there anybody with you at the time?

A. My brother, James H. Reed, stood alongside of the pilot-house, or the outside of the pilot-house.

Q. Where was Mr. Sterritt at that time?

A. He was in the forward cabin, lying in his berth; he had just laid down about two or three minutes.

Q. Where was Taylor?

A. In the engine-room.

Q. What light had you?

A. A green light on our starboard side, a red light on our port, and a white light at the mast-head on the flag-staff over the stern, twenty-five feet high.

Q. Who lit these lights?

A. My brother, James Reed.

Q. Did you see him light them?

A. Yes, sir.

Q. When did you last notice those lights before the collision?

A. When we were leaving the dock.
Q. When did he light them?
A. About five minutes before we left.
Q. Did you notice those lights at any other time before the collision, after you left the dock?
A. I could not see the lights over my head on the top of the pilot-house; I did notice the white light on the flag-staff.
Q. Are you familiar with the Kills, and the depth of the water there?
A. Yes, sir.
Q. What is the depth of water in the Kills along the Jersey shore?
A. It is of different depths all along; inside, where the collision occurred, you could carry about nine feet.
Q. How far in?
A. In to the docks.
Q. Large vessels are in the habit of going into those docks?
A. Yes, sir; there are schooners and propellers—in fact, we all run in there at the right state of the tide.
Q. Do not ships and brigs run in to the copper docks?
43 A. I have never seen any there.
Q. How long is your boat?
A. Fifty feet.
Q. What was the length of the hawser you had out?
A. Thirty-five feet.
Q. How long was the Hurd?
A. One hundred feet, I think; I am not sure.
Q. When you heard this whistle ahead, what did you do?
A. I answered it immediately with two.
Q. What else did you do?
A. Stopped and backed.
Q. Did you ring your bell?
A. Yes, sir; I rung four bells.
Q. How long was it after you blew your whistle before the collision occurred?
A. About a minute.
Q. Had your vessel changed its course previous to that time?
A. Yes, sir; when the whistle blowed I starboarded my wheel and stopped.
Q. How soon did you stop?
A. As soon as I blew the whistle.
Q. You mean you stopped your engine?
A. Yes, sir; stopped the engine and backed, and then stopped again and lay still.
Q. And you were lying still at the time you were struck?
A. Yes, sir.
Q. Where did the Atlas strike you?
A. In the starboard side about midships.
Q. What happened then to the Atlas? Did she slip by you? How did she strike you—quartering?
A. No, sir; about head on.
Q. And what became of your vessel at that time? Did the Atlas pass by you?
A. No, sir; she shoved us down on the tow.
Q. Did your boat hit the tow?
A. I think we struck the port bow of the light boat, but I ain't sure, because we were trying to get to our engine.
44 Q. Do you know what vessel t was that struck the Hurd?

A. It must have been the barge, for the Atlas was still in us.

Q. Did you see whether the Atlas touched the other boat?

A. Yes, sir.

Q. Then, when that other boat was struck, the Atlas was between you and the Hurd, on your starboard side?

A. No, sir.

Q. She was between you and the Hurd?

A. The Hurd was on the starboard side of the tow.

Q. And the Atlas struck you on the starboard side and stayed there?

A. Yes, sir.

Q. And therefore you were then lying on the Staten Island side of the Atlas?

A. On the Staten Island side of the tow.

Q. You think the Kate touched the light-boat. On what part did it touch?

A. On the port side.

Q. Which way were the bows of your boat heading?

A. Towards Staten Island; not straight across, but about quartering up; about south, I should judge.

Q. Then the bows of your boat were on the starboard side of the Atlas?

A. Yes, sir; the bow of our boat.

Q. When you were struck where were you?

A. In the wheel-house.

Q. What did you do?

A. After the Atlas struck us, I came out and put one foot on the bow of the Atlas, and rested the other on the Kate's house; but when I saw that the Atlas was moving away, I stepped back again on board of the tug.

Q. Which way was she moving?

A. She was moving astern, after all the damage was over with.

Q. Was the time when you put your foot on the bow of the Atlas before or after she struck the Hurd?

45 A. After she struck.

Q. Do you know which side of you the Atlas went when she backed up?

A. Yes, sir; she passed off on the left of us—to her right; she passed off the Staten Island side.

Q. Do you know what the rules and regulations *after* the management of boats are in case of two steam-vessels meeting?

A. Yes, sir.

Q. Please tell us what they are in case of two steam-vessels approaching each other in opposite directions?

A. The boat that blows the first whistle has the right of way. If you blow to the right, you can't go in all cases to the right; and in this case I blowed two whistles to go to the left, and she should have answered them and told me whether I could do it or no. If you see that you are going to collide with another boat, the law calls for you to stop your engine and lay still.

Q. What is the rule when the vessels so near together that a collision seems inevitable—so near that you can't take either course?

A. Give three short whistles and then stop your engine.

Q. How many whistles did you blow?

A. Two.

Q. How far off was the Atlas when you blew your two whistles?

A. About one-eighth of a mile, I should think, but I could not tell very exactly in the night.

Q. Are you a licensed pilot?
A. I am.
Q. Have you got your license with you?
A. Yes, sir. (Witness produced a pilot's license, which was marked "Exhibit A.")
Q. Have you any other license than that?
A. No, sir; it is all that I require.
Q. Have you ever had any other license?
A. No, sir.
Q. Then you were not licensed when this collision happened?
46 A. No, sir.
Q. Did you ever have any conversation with any person about this collision?
A. No, sir; not that I know of.
Q. Have you ever talked with Captain Van Decker, of the Hurd about this collision?
A. I seen him over there at Pavonia Ferry, or Jersey City Ferry, this winter, but nothing passed between us.
Q. Do you know George Gillings?
A. Yes, sir.
Q. Did you ever have any conversation with him about the collision?
A. I can't say whether I did or not.
Q. Do you remember having a conversation with George Gillings in December last about this collision?
A. What time in December?
Q. In the early part of December.
A. No, sir; I don't know as I seen him in December.
Q. Did you see him in the month previous to that—November?
A. That I can't say.
Q. Did you not tell George Gillings that you did not answer the Atlas's signals right, and that you were sorry for it?
A. I did not.
Q. Did you not say something like that?
A. No, sir; for I did answer the Atlas's whistle just as I calculated to do, and just as I would have done in any other case.
Q. You say you saw a light on a mast; do you know whether that was on the Atlas or on the barge alongside of her?
A. I can't say.
Q. When was it that you noticed the lights of the Atlas particularly?
A. After she blew her one whistle.
Q. Did you at any other time notice the lights of the Atlas after the whistle was blown?
A. No, sir; I was looking all the time after she blew her whistle until she came into us to find out what shape she was in.
47 Q. Did you notice any lights on any of the vessels after the collision?
A. No, sir; I was busy with the tug-boat then—my own boat—trying to save her.
Q. How long was it after you were struck till you sunk?
A. Between five and ten minutes; I don't think it exceeded seven.

Redirect examination:

Q. You have stated you' crew; is that the usual crew for a tug of that size?
A. Yes, sir.
Q. You were asked whether you saw the lights on your boat; just tell

the court where the green and red lights are placed on tugs of that size.

A. On top of the pilot-house—on the outside of the top.

Q. (By Mr. Woodruff.) Your tug was a propeller?

A. Yes, sir.

Q. You were asked if you noticed any lights on the Atlas?

A. Yes, sir.

Q. You were looking straight at the Atlas, trying to make her out?

A. Yes, sir.

Q. And yet you saw no lights on her but what you have stated?

A. I could not see no side-lights at all.

Q. This light that you did see up to the time that the whistle was blown, you had confused it with the lights of Port Johnson?

A. Yes; they were all mixed up.

Q. (By the Court.) When the whistle was blown, then you did identify this light?

A. Yes, sir; then I could see that it was on a steamboat.

Q. How did it bear then?

A. A little on our starboard bow, in towards the Jersey shore.

48 BENJAMIN F. TAYLOR sworn.

Examined by Mr. Stillman:

Q. Where were you on the 18th day of March, 1868?

A. On board the tug-boat Kate; I was her fireman.

Q. Do you remember the circumstance of your leaving New Brighton on that occasion?

A. Yes, sir.

Q. About what time was it when you started?

A. To the best of my knowledge, it was about a quarter past three.

Q. When the tug left New Brighton did you notice her lights?

A. I did.

Q. Were they burning?

A. They were.

Q. What lights were burning?

A. A red light and a green light and a white light; the mast-head light.

Q. Did you observe the schooner behind you?

A. No, sir.

Q. When did you go into the engine-room?

A. I went into the engine-room at twelve o'clock.

Q. From that time until you left New Brighton, what were you doing?

A. Watching part of the time; and I went to work and got up steam so as to be ready to start at three o'clock, but we did not get off until about a quarter past three.

Q. Did you hear any of those whistles blown?

A. Yes, sir.

Q. How long was it after you left New Brighton before you heard a whistle?

A. To the best of my knowledge, it was about ten or fifteen minutes.

Q. How many whistles did you hear?

A. One; and then I heard two from our own boat after that.

Q. Is your engine-room aft of the pilot-house in the Kate?

A. It is.

Q. Do you step right from the deck of the Kate?

49 A. No, sir; I have to go down steps; I think there are about fivs steps.
Q. When you are down there, you can't see out or around?
A. No, sir.
Q. You heard one whistle?
A. Yes, sir.
Q. How soon after that whistle was blown did you hear two whistles blown from the Kate?
A. Immediately.
Q. Did you get any signals from the captain of the Kate?
A. Yes, sir.
Q. State what these signals were.
A. There was one bell to slow down, and one to start, and two to go back.
Q. The one bell to slow down came how soon after the two whistles?
A. They all came together; the whole after the whistle.
Q. How long after you heard the whistle was it that you received the signal to slow down?
A. I don't think a minute had expired.
Q. The others followed how fast—the signal to stop and the signal to back?
A. They were all together, just as quick as they could be given.
Q. Did you hear any answer to the two whistles that were blown by the Kate?
A. No, sir.
Q. Were you listening to hear an answer?
A. No, sir.
Q. How soon after you had reversed your engine was it that the collision occurred?
A. I don't think it was over a minute.
Q. The one whistle that you heard from the approaching boat, the two whistles that the Kate blew, and your signals—how fast did they follow each other, and how long do you think they all occupied?
A. I don't know as I can say, but I should not think it was over three minutes altogether; three or four minutes.
50 Q. Then the collision followed in about a minute more?
A. In about that time, I should judge.
Q. How many revolutions of your engine did you make backward?
A. I should think we made about seventy.
Q. You heard the crash of the collision; on which side was it?
A. On the right-hand side, as we stood facing the bow.
Q. What did you do?
A. I tried to get out.
Q. Did you do anything with your engine?
A. Yes, sir; stopped her.
Q. How soon did you get out on deck?
A. In a short space of time.
Q. Your engine was then still?
A. Yes, sir.
Q. What did you do after you got on the Kate's deck?
A. I went across and got aboard the Atlas.
Q. The Atlas was then in collision with your boat?
A. Yes, sir.
Q. You went onto the bow of the Atlas?
A. Yes, sir.

Q. From there you could see the red and the green lights if they had been burning?

A. Not very easily.

Q. Did you see them?

A. No, sir; for I was not looking for them.

Q. After you got on the Atlas, did you see any lights?

A. Yes, sir; I saw one light that a man was carrying around in his hand; a small one.

Q. Did you remain on board the Atlas or go back?

A. I remained on board the Atlas.

Q. In all that time what lights did you see on the Atlas that would be visible to people outside of the Atlas?

51 A. I did not see any myself. I did not go outside. I stayed in a sort of a cabin they had.

Q. How far were you from the Jersey shore when you got on the Atlas?

A. I should judge about 150 yards.

Q. Did you try to get back on to the Kate?

A. I did.

Q. What prevented it?

A. A man making fast the line. I went around that way thinking I might get up on the barge and go over that way and get on, but he would not let me go. He stopped me.

Q. When you were on board the Atlas did you hear any hail from the Kate?

A. I did.

Q. What was the hail?

A. I believe our captain hailed them, and asked them to shove him on shore as he was sinking.

Q. You heard that hail?

A. I did.

Q. Was there any answer made to it?

A. Some of them on the upper deck wanted to know what he had said, and I told them he wanted to be shoved ashore.

Q. Did they then pay any attention to the hail?

A. No, sir; they backed out and went on to New York.

Q. How long did they stay there, by the Kate, after the collision?

A. I had just got on board of the Atlas nicely when she backed out.

Q. Did she then go right on to New York?

A. Not immediately. She backed off and fooled around there a little bit, and then she went. I don't know how long she stayed there before starting, but it was not long.

Q. Was there anything said by anybody on board the Atlas to you about the collision?

A. No, sir.

Q. Did you have any conversation with any one there?

A. Not that I remember.

52 Q. Did you have any conversation on board the Atlas when you got to New York?

A. Yes, sir; with the captain. He asked me if I thought that she (the Kate) had sunk, and I told him yes. He said he did not think she was.

Cross-examined by Mr. Woodruff:

Q. When did you see the lights of the Atlas first?

A. I did not see them at all.

Q. When did you see your own lights?
A. Just before we left the dock.
Q. What lights had you then?
A. A red light and a green light, and a white light on the spar.
Q. Did you see those lights again?
A. No, sir.
Q. Tell us what signals you got from the pilot-house, in reference to your engine?
A. Two to stop and two to go back.
Q. Did they follow each other in quick succession?
A. Yes, sir.
Q. When did you come out of the engine-room?
A. Not until after the collision. I then went on board the Atlas. I went on her bow. I went into the cabin of the Atlas.
Q. Did you have a conversation there with any of the men on board the Atlas?
A. Not that I remember.
Q. Did you say anything to any of the men on board the Atlas in reference to your lights?
A. I don't think I did.
Q. Did not any of the men on board the Atlas ask you whether you had any lights up, or why you did not have any lights up?
A. I do not remember.
Q. Did not they say to you that you had no lights up at the time of the collision?
A. No, sir.
Q. Did not they ask you where your lights were?
A. Not that I remember.
53 Q. (By the Court.) You had charge of the engine?
A. Yes, sir.
Q. When did you first expect trouble on that occasion?
A. When I heard the whistle.
Q. Why did you expect trouble when you heard the whistle?
A. As soon as I heard the bell I knew there was something wrong, or else we would not have to back.
Q. You started to back at once?
A. Yes, sir.
Q. Were you still backing when you were struck?
A. Yes, sir.
Q. Did you have hold of the bar at the time the blow was received?
A. I had.
Q. Did the blow knock you down?
A. No, sir; I was standing at a partition, so that it could not very well knock me down.
Q. Did you do anything more with the engine after that?
A. Yes; I stopped her.
Q. Did you have bells to stop her, or did you stop at once yourself?
A. I do not recollect whether I stopped myself or had bells to stop.
Q. Then you went onto the bow of the Atlas?
A. I did.
Q. From there where was it that you tried to get back?
A. I tried to get up off the Atlas on our deck again; I went on her side and thought I would get over the barge and get down on our boat, but I was prevented.
Q. Then you went into the little cabin?
A. Yes, sir.

Q. (By Mr. Woodruff.) Was that after the collision was all over?
A. Yes; after the collision was all over and the boat had started.
Q. The Atlas was then in motion?
54 A. Yes, sir; she was heading out of the Kills coming toward New York.
Q. (By the Court.) How many revolutions do you think you made backward before you felt the crash?
A. I can't tell exactly, but I suppose about seventy.
Q. (By Mr. Donohue.) How many turns a minute would she make?
A. About seventy.

JOHN M. STERRITT sworn.

Examined by Mr. Stillman:

Q. Were you on board the tug Kate at the time of this collision?
A. Yes, sir.
Q. Where were you from the time the tug left New Brighton to the time of the collision?
A. Shortly after she left New Brighton I went below in the cabin and took off my boots and hat and lay down in my berth.
Q. Did your hear the whistle?
A. Yes; I heard several.
Q. State the order in which you heard them, and the intervals that elapsed between them.
A. I did not pay a great deal of attention to them, but they appeared to come very rapid.
Q. Did you pay enough attention to them to know what they were?
A. Not exactly—I don't think I could state it exactly.
Q. When, after you left New Brighton, did you leave the cabin?
A. As soon as I heard the bells and the crash.
Q. What bells did you hear?
A. I heard two to stop and two to go back.
Q. When you heard the bells to stop what did you do?
A. I did not do anything—the crash came almost as quickly as the bells.
Q. Did you have time to go from the cabin to the engine-room before the collision?
A. No, sir; I had not time, I think, to get out of my berth before the collision, after the four bells had been given.
55 Q. What did you do when you went out?
A. I ran to the engine-room and jumped down there; I thought at first that the man in charge there had been hurt. The crash broke off four of the cocks in the front of the boiler, and the engine-room was filled with steam so that you could not distinguish anything. The lights were knocked out, but I felt around for him, expecting to find him lying on the bottom of the fire-room. Then I jumped up on deck, shut the steam off from the boilers, and ran forward; there I met captain. He said, "We have been run into." I said, "Is your lights up?" He says, "Yes." Then I asked him, "Is the lights of the boat that ran into us up?"
(Objected to.)
Q. What did you next do?
A. I then ran down on the starboard side of the Atlas, and asked if the fireman and the deck-hand were on board the Atlas. I jumped up so that I could hold fast to her rail.
Q. Did you look for her lights?

A. I looked particularly when I was going down the starboard side. I looked then as particularly as a man could look walking down alongside of a boat.

Q. Were her side-lights burning?

A. I did not see any lights except what is called the spar-lights.

Q. If the side-lights had been burning could you have seen them?

A. I think I could.

Q. If the side-light had been burning you could have seen it?

A. I think so.

Q. (By the Court.) Do you mean to say that you deliberately looked to see whether she had her side-lights—thinking of them at the time?

A. Yes, sir.

Q. And you could not see any?

56 A. No, sir; the only light that I saw was her spar-light.

Q. (By Mr. Donohue.) You had a conversation just before, with the captain, about lights?

A. Yes, sir.

Q. What lights did the Kate have up?

A. I could see her mast-light, but from where I stood on the forward deck I could not see her side-lights; but I took them both off her after she sank. The captain was in the yawl-boat with me while I took one off, and one I went for myself.

Q. How were they as to the amount of oil that was in them when you took them off?

A. That I cannot say.

Q. (By the Court.) I suppose you did not carry these in that place from which you took them off unless when burning?

A. No, sir.

Q. Did you hear Captain Reed give any hail to the Atlas?

A. Yes, sir; he asked them to shove him ashore.

Q. What did they do?

A. They did not appear to take any notice at all of it. I did not hear any reply.

Q. Did the Atlas wait there, or lay by you at all?

A. No, sir; she immediately backed off and put her wheel over, and went by us and passed along.

Q. Did she go on her way as quickly as she could get clear of the boats?

A. Apparently so.

Q. How long before the Kate sank after the collision?

A. I should not think it was a great deal over five minutes; it might have been six or seven.

Q. How long after you left New Brighton was it that this collision occurred?

A. I should think, may be, twenty minutes; may be a little longer or a little less.

57 Cross-examined by Mr. Woodruff:

Q. Where were you when you looked to see if the Atlas had any lights?

A. I was going down on the starboard side from the Kate's bow. After I had been in the engine-room I passed the forward deck; then I passed on the starboard side. I went on the port side when I went to the engine-room. Then I passed down the starboard side, and I was on that side when I looked.

Q. Before or after you got onto the rails of the Atlas?

A. Before.

Q. What did you do when you got upon the rail of the Atlas? Did you go on to her head?

A. No, sir.

Q. Did you go back to your boat?

A. Yes, sir.

Q. What did you do then?

A. I launched the yawl-boat, with the assistance of the captain. Then I went around to the engine-room, opened the furnace-door, came forward and got my boots and hat out of the cabin, and ran aft and let go the lines, and while I was letting go the lines the water came on the after-deck.

Q. Where was the Atlas at that time?

A. She had passed by us.

Q. Where was the Atlas when you looked for her lights?

A. She was head into us.

Q. Your deck was a good deal below the guards of the Atlas?

A. It was below; I can't say how much.

Q. Were not the guards of the Atlas close up to the top of your house?

A. No, sir; I think not. In fact I know they were not, because I passed between the bow of the Atlas and our house, and had they been close up I would have noticed.

Q. What is the distance between the water and the deck of your boat?

58 A. I cannot say exactly; probably one or two feet. About two feet.

Q. How did you get on the rail of the Atlas?

A. I stepped upon our rail and put my hands on her rail.

Q. Did that bring you level with her deck?

A. I stepped up on her rail and then her wearing-piece.

Q. Her deck, then, was above your rail?

A. Yes, sir.

Q. How deep is the water where your boat sunk?

A. I should think it was about eighteen or twenty feet.

Q. Was the top of your vessel out of water after she sunk?

A. Yes, at low water.

Q. It was at low water that you got her lights out?

A. Yes, I waited till morning—low water.

JAMES H. REED sworn.

Examined by Mr. Stillman:

Q. Were you on board the tug-boat Kate on the 17th and 18th days of March, 1868?

A. Yes, sir. I was a deck-hand on her.

Q. What did you have to do with the lights?

A. Fill them and trim them and light them.

Q. Do you remember leaving New Brighton on the morning of the 18th?

A. I do. I should judge it was about three o'clock. It may have been a little after three. It was middling dark.

Q. Did you light the boat's lights before you left?

A. Yes, sir.

Q. What did you do with the lights after you lit them?

A. Put them in their places on the pilot-house.

Q. You put the green light on which side?

A. On the starboard side, and the red light on the port side. The white light was aft on the flag-staff.

Q. Were those lights burning brightly?

A. Yes, sir.

Q. How much oil was in those lamps?

59 A. They were full. I don't know how much they hold.

Q. When was the last time you saw those lights before the collision?

A. When we left New Brighton.

Q. After you left New Brighton, and before the collision, did you notice them?

A. Yes, sir.

Q. How long before the collision?

A. Just as we left the dock.

Q. Were they then burning?

A. Yes, sir.

Q. After you left the dock where did you go?

A. I went up beside the pilot-house, on the starboard side.

Q. Where was Captain Reed?

A. In the pilot-house?

Q. Do you know what course you then took—what place you headed or?

A. For the copper dock.

Q. Did you hear the whistle blown?

A. Yes, sir.

Q. Did you see any approaching steamer?

A. No, sir.

Q. Did you see any white lights ahead of you?

A. No, sir; I did not take notice of any white lights.

Q. After that, when the whistle was blown, did the Kate blow any whistles?

A. Yes, two.

Q. How soon after this one?

A. Just as soon as she could.

Q. Did you hear any signals given to the engineer on the Kate to do anything with the engine?

A. Yes; I heard four bells.

Q. How fast did those bells come?

A. Well, just as fast as you could give them and tell what they were.

Q. Did the Atlas answer to the whistles of the Kate?

A. No, sir.

Q. How soon after the two whistles were given by the Kate did the collision occur?

60 A. It could not have been over a minute or a half a minute, I think, but it might have been more than that.

Q. Did the Kate back at all?

A. Yes, sir.

Q. How did the Atlas strike the Kate?

A. Amidships.

Q. Did you observe the Atlas when she came to you just before the collision?

A. I saw something, but I could not tell what it was.

Q. Was there any light on it?

A. No, sir; I could not see any.

Q. What did you do after the collision?

A. I got on board the Atlas.

Q. Did you look at the Kate?
A. Yes, sir.
Q. Were her lights burning then?
A. Yes, sir; I saw them.
Q. How far do you think you were from the Jersey shore at the time of the collision?
A. About one hundred yards.
Q. Did you get off the Atlas again?
A. No, sir. I tried to, but could not.
Q. Why could you not?
A. She was too far off. She backed right off almost as soon as I got on.
Q. Did you hear Captain Reed make any hail to the Atlas?
A. Yes, sir; to push him ashore, that he was sinking.
Q. Did the Atlas make any reply?
A. Not as I could hear. Some one hollowed out, "What is he saying?" That I heard.
Q. Did you hear any answer to that?
A. No—yes, Taylor says to them that Captain Reed wants them to push him ashore, for he is sinking.
Q. Did the Atlas pay any attention to that request?
A. No, sir; she kept backing off.
Q. Did she then come on to New York?
A. Yes, sir.
Q. When you were on board the Atlas did you see any side-lights?

61 A. No, sir.

Cross-examined by Mr. Woodruff:

Q. Did you light the lights on board the Kate on the morning of the 18th of March, 1868?
A. Yes, sir; just before we left the dock.
Q. Did you see the lights of the Kate after that?
A. Yes, sir; I saw them last just after we left the dock.
Q. Did you see them again after that?
A. Yes, sir; when I got on board the Atlas.
Q. What lights did you then see on board the Kate?
A. The starboard light and a stern-light.
Q. Where was the starboard light?
A. In its box where we kept it, in the pilot-house.
Q. How were you employed after you left New Brighton?
A. I did not do anything; I stayed then by the side of the pilot-house.
Q. Where were you standing when you heard the whistle from the Atlas?
A. On the starboard side, alongside the pilot-house.
Q. When your boat was struck were you standing by the pilot-house?
A. Yes, sir.
Q. What did you do then?
A. I got right on board the Atlas; I stood on her rail, and then I got over onto her deck. I wanted to get back again to our boat, but could not.
Q. Did you go into the cabin of the Atlas?
A. I went over on the deck where the passengers were.
Q. As soon as you got on board?
A. No, sir.

Q. Where were you when you heard the calls for help?
A. I stood on the rail of the Atlas, right up at the bow.
Q. Were you anywhere else on the Atlas but on the bow?
62 A. Yes, sir; on the deck, and inside of the cabin, after she passed the Kate.
Q. How long did you stand on the bow of the Atlas?
A. I cannot say; but it was not very long, for she backed right out almost as soon as she could get out.
Q. Did you stay on the bow of the Atlas until she was clear of the Kate?
A. Yes, sir; so that I could not go back onto the Kate; then I tried to go on board the barge and get on the Kate in that way, but they would not let me.
Q. After the collision, did you have any conversation with any of the men on board the Atlas?
A. No, sir.
Q. You did not speak to any one about the collision?
A. No, sir.
Q. Was there anybody from your boat there with you?
A. Yes, sir; Mr. Taylor.
Q. Did you not talk with any of the hands of the Atlas?
A. No, sir.
Q. Did anybody ask you whether you had any lights at the time of the collision?
A. No, sir.
Q. Did not Ben. Taylor ask you whether you had your light burning?
A. No, sir; not that I can remember.
Q. Did you not say that the only light you had was down by the engine-room door?
A. No, sir.
Q. Did you have any conversation after the collision with Captain Durham, of the Atlas, at New Brunswick?
A. Yes, sir; but I don't remember much of it now.
Q. State what you do remember.
A. He asked me some questions about it and I told him I had nothing to say, because I did not want to talk to him about it, for I knowed what he was after.
Q. Did you say anything to him about it?
A. No, sir.
Q. Did you not say to Captain Durham that you hoped you would not be called as a witness?
63 A. Yes, sir.
Q. Did you tell him you could swear that the stern-light was burning, but could not say as to the other lights?
A. No, sir.
Q. Did you not tell him that at the time of the collision you were aft attending to the hawser?
A. No, sir.
Q. (By Mr. Donohue.) It was not the fact that you were aft tending a hawser at the time of the collision?
A. No, sir.
Q. (By Mr. Stillman.) The captain brought another man along to have this conversation with you?
A. Yes, sir.
Q. Did the man say anything?
A. Yes, sir; he said he could fetch a dozen of men who could swear

that the Kate never had lights properly, and that she never had them lit going out of the river. I said I knew better than that, for she did.

Q. Who was present at that conversation?

A. Nobody but Mr. Durham and myself, and the man he had with him.

Q. Who was that man?

A. I don't know; he was a stranger to me. I never saw him before or since.

Recross-examination:

Q. Did not Captain Durham say that he had passed you once since the collision without lights on your boat, and that he could bring a dozen men to prove it?

A. No, sir; Captain Durham did not say nothing about it.

Q. (By Mr. Stillman.) When was it that *that* these two men came to see you?

A. I think it was in the summer; it was along in the forenoon, I think. I don't recollect the month.

Q. Try and think as near as you can when it was.

A. I cannot recollect when it was.

64 GEORGE M. GILLINGS sworn.

Examined by Mr. Woodruff:

Q. Did you have any conversation with the captain of the tug Kate in reference to this collision?

A. Yes, sir.

A. When was it, and where?

A. Some time last fall; I think it was last November, at Perth Amboy.

Q. Tell us what was said.

A. We were talking about the collision and talking about the boats, and I asked him if he had his lights up at that time. He said they were up before he left New Brighton wharf, but he could not say whether they were up afterwards, only the stern-light, and that was up when the boat sunk. He said also that the Atlas blowed one whistle and he answered with two, and he was sorry for it. That was about all the conversation we had there.

Q. Did he not say that he had not answered the whistle right? (Objected to as leading.)

Q. Do you remember whether what you have stated is all that he said to you?

A. I don't recollect now exactly whether he said anything more or not; that that I wrote was done a few days afterwards, and I don't recollect exactly now what is in it.

Cross-examined by Mr. Donohue:

Q. What relation *are* you to the captain of the Atlas at the time of the collision?

A. Brother-in-law.

Adjourned to Monday at 10.30.

65 U. S. district court, eastern district of New York.

THE PHŒNIX INSURANCE CO.
vs.
THE STEAMBOAT ATLAS, HER TACKLE, &C.

Before Hon. Justice Benedict, May 3, 1869.

WILLIAM DURHAM sworn for respondents.

Examined by Mr. Sanford:

Q. You were employed as captain of the steamer Atlas at the time of this collision?

A. Yes, sir.

Q. And are still acting in the same capacity?

A. Yes, sir.

Q. How long have you been master of steamboats?

A. I have been captain twenty-two years this summer.

Q. And you were pilot?

A. Yes, sir. I am pilot now; that is, I have my license.

Q. And you were such at the time of the collision, and then had a regular license?

A. Yes, sir.

Q. On the morning of the 18th of March, 1868, where were you, and where were you bound?

A. Bound to New York.

Q. From where?

A. South Amboy.

Q. On the steamer Atlas?

A. Yes, sir.

Q. Coming through the Kills?

A. Yes, sir.

Q. Did you have anything in tow?

A. Yes, sir; had the barge Julia.

Q. How was she attached on the steamer?

A. She was attached on the larboard side.

Q. How did the bows range?

A. The bow might have been about four feet ahead of the steamer.

66 Q. How was the wind?

A. About S. S. W.

Q. How was the tide?

A. The tide was a-running off a little; it was very near high water.

Q. What was your position in the Kills when you first discovered the approach of the Kate—what was your position in the river?

A. We were about the middle of the river.

Q. And heading what course?

A. We were a-heading about east by south half south. I didn't look at the compass, but that is our course down there.

Q. Where were you, personally, on board?

A. I was sitting in the pilot-house when my attention was first drawn.

Q. Who was with you?

A. William Parrisen and James McKenna.

Q. State the position which each held.

A. One was pilot and the other was a hand.

Q. Well, which?

A. William Parrisen was the pilot, and McKenna was the hand.

Q. Won't you state how your attention was first directed to the fact of the approach of the vessels?

A. My attention was first drawn by the pilot saying "What is that?" or "Which way is that going?" I won't be positive which of those two words.

Q. Well, what did you do?

A. I jumped up and took particular notice to see if I could see any lights on the tug or boat, to know which way it was going.

Q. What was the result of your observation?

A. I didn't see no light; the light appeared to go lower in the water, as if it came from a cabin window.

Q. What was the color of it?

A. White; that was a little on our larboard bow.

Q. And about how far off?

A. I think it was three lengths of our steamboat.

Q. What are the dimensions of the Atlas?

67 A. The Atlas, on deck, is 250 feet 8–10.

Q. What was the character of the night? Was it thick and foggy, or clear?

A. It had been pretty dark and stormy, but it had let up then so you could see quite a ways.

Q. Could you see lights plainly enough?

A. Yes, sir.

Q. There was no fog to obscure them?

A. No, sir.

Q. What was done?

A. Well, we blew our whistle—the pilot, Mr. Parrisen, did.

Q. How many times?

A. Once.

Q. As a signal to keep to the right?

A. Yes, sir; about a minute after the Kate blew two whistles.

When you signalled to keep to the right, how was the helm?

A. Ours was a little port; then we ported it to keep our own side.

Q. What was the next thing that you observed?

A. The Kate blew a whistle twice.

Q. Had you seen any side-lights up to that time—any colored lights?

A. No, sir.

Q. Were any visible?

A. No, sir.

Q. Then that was the first intimation you had that they were approaching?

A. Yes, sir; the first intimation that we had was the whistle.

Q. About how great was the distance at that time between the two, should you think, when the whistles blowed?

A. I think about two lengths of our boat.

Q. How much time elapsed between the blowing of the whistles of the Atlas and the blowing of the two whistles by the Kate?

A. About a minute.

68 Q. After the two whistles were blown, what occurred on your boat?

A. I gave four bells to stop her and back her, and the jingle-bell to back her strong, and sung out to Captain Schenck to starboard his helm.

Q. Who was Captain Schenck?

A. Captain of the barge Julia.

Q. The barge you had in tow?

A. Yes, sir; and we starboarded our helm, and then in about a minute we came in collision with the Kate.

Q. Did the engineer back?
A. Yes, sir.
Q. What was the course of the tug Kate at the time when you came in collision?
A. The Kate was a-heading about south and by east.
Q. Where did you strike her?
A. Struck her about the engine-room.
Q. After the collision how did she pass in respect to your vessel?
A. She came alongside of us.
Q. On which side?
A. On the starboard bow.
Q. And on her starboard?
A. Yes, sir.
Q. So that the vessels were side by side, each with their starboard side on the other?
A. Yes, sir.
Q. At the time of the collision was your headway still on?
A. She was going ahead a little.
Q. How were the wheels?
A. The wheels were going backwards.
Q. What further occurred?
A. Then the tow came up and struck the barge; the larboard bow of the schooner struck the larboard bow of the barge.
Q. That is of the Julia?
A. Yes, sir; the barge Julia.
Q. Go on and state the further circumstances of the occurrence.
69 A. Well, then we backed and the tow struck. They swung around on the larboard side of the barge; the schooner and the light-boat and the loaded boat—the Hurd, I suppose—they struck on the larboard side of the barge; and we backed out and they came ahead a little, and the tow-line parted on the barge, and I sung out to one the men to get another tow-line on her.
Q. (By Mr. Donohue.) That is, your barge's tow-line?
A. Yes, sir—come ahead a little; and I sung out to one of the men to get a tow-line on the barge, and told Captain Schenck to hail them, to know if they wanted any assistance.
(Mr. Donohue objected to the witness telling what he told.)
Q. What did he do?
A. We hailed him three times whether we could lend him any assistance.
Q. Did you hear any reply?
A. No, sir.
Q. And then what did you do?
A. Then he told me that I can't get any answer from him; I guess they are all right. Then I told the pilot to go ahead.
Q. Were you aware then that either of the vessels had sunk or was sinking?
A. No, sir.
Q. Had any then sunk—were they all visible?
A. Yes, sir; all but the loaded one. I could not see her for the barge.
Q. What lights were on board the Atlas at that time burning?
A. There were two on the bow, two on the flag-staff, and one on each wheel-house.
Q. What were the colors of the wheel-house lights respectively?
A. Red and green.

Q. Were they good lights?

70 A. Yes, sir.

Q. Anything back of them?

A. Yes, sir; they have a reflector back of them, which very few boats has that runs the river.

Q. Did you know personally whether those were burning at the time of the collision?

A. I do, sir.

Q. Were they?

A. Yes, sir.

Q. When did you notice them?

A. I noticed them as soon as the collision occurred with the Hurd—as soon as the tow came up into the barge. I stepped out to look at them.

Q. To see if they were burning?

A. Yes, sir; that is, the after light and the two wheel-house lights. I didn't go down on the bow.

Q. How far were you from the Jersey shore when the collision occurred?

A. About the middle of the river.

Q. What is the distance? How wide is it there?

A. I have never heard, but I think it is about a third of a mile.

Q. Was there ample room for the vessels to pass to the right of each other on either side?

A. Yes, sir; plenty.

Q. What is the depth of the water there?

A. Seven fathoms of water on the Staten Island side and five on the Jersey.

Q. Was there time, in your judgment, after the signal of two whistles was blown from the Kate, to change your course and clear them?

A. No, sir.

Q. Was it possible, after that signal of the two whistles was given, to avoid the collision?

A. No, sir.

Q. If the Kate had kept her course would you have avoided her, in your judgment, by keeping to the right?

A. Yes, sir.

Q. And how much margin—how much lee-way—how much space?

71 A. Well, I should think she could have cleared him fifty feet.

Q. Do you know what sunk the Hurd?

A. No, sir.

Q. What is the position of the pilot-house on the Atlas?

A. The pilot-house is about seventy feet from the bow on her deck. The height of the deck from the main-deck is ten feet and a half, and the pilot-house is about five feet above.

Q. How far do the deck hawsers run abaft of the pilot-house?

A. I think about fifty feet; I never measured, but I think about fifty feet.

Q. Is it possible from any part of the bow-deck of the Atlas to see the side-lights of the Atlas?

A. No, sir; can't see them.

Q. Have you examined particularly with reference to that?

A. Yes, sir; particularly.

Q. When?

A. I examined a Saturday night.

Q. In obedience to my direction?

A. Yes, sir.

Q. (By the Court.) From the main-deck you cannot see the side-lights anywhere?

A. No, sir; from the bow.

Q. How would it be from a boat lying alongside?

A. Couldn't see them when she was under the bow, sir.

Q. (By Mr. Sanford.) You had a conversation with young Reed, the deck-hand on board the Kate, didn't you?

A. Yes, sir.

Q. Where?

A. New Brunswick.

Q. What did you go there for?

A. I went down home.

Q. Do you reside in the neighborhood?

A. Yes, sir.

72 Q. How did you come to have any interview with him?

A. I was told they had the boat in so many places, I was determined to go and see one of the parties to ask him where the boat was.

Q. What boat?

A. The boat Hurd, sir.

Q. How do you mean, "in so many places?"

A. I heard that they said she was alongside the Kate, and that she was in between the two boats, and that they would swear to that, and then I made up my mind I would go to see one of the witnesses.

Q. What was the conversation? Just state it to the court.

A. I called and told him what I heard, and says I, "I say the loaded boat was alongside the schooner, was not that so?" He says, "Yes." I says, "I didn't come here to pump you as a lawyer, but was your lights up that night?" Says he, "That ain't for me to say." Says I, "I will ask you one more question: where was you that night; wasn't you aft attending to the hawsers, or doing something aft?" and the reply was "Yes." I had a conversation once after that, too.

Q. With whom?

A. With the same Mr. Reed.

Q. Where was that?

A. One Sabbath morning.

Q. Where?

A. New Brunswick.

Q. What was the purport of it?

A. Our trial was to come on on Monday, and I asked him if he had been notified of any trial, and the answer was, "No."

Cross-examined by Mr. Donohue:

Q. You speak about having spoken to the captain of the barge to say something to somebody. Where was that captain of the barge?

A. He was then at the pilot-house, sir.

Q. Your pilot-house?

A. No, sir; the pilot-house of the barge.

73 Q. At that time had you backed away from the Kate?

A. Yes, sir.

Q. How far away from *you* were you?

A. About twenty yards, I think.

Q. Which side of you did she lay on then?

A. She bore right across our bow.

Q. Could you see her?

A. Yes, sir.
Q. Where did she lay?
A. She lay ahead of us.
Q. Twenty yards ahead?
A. About twenty yards.
Q. Lying right across your bow?
A. Yes, sir; about twenty yards off when we backed up.
Q. When you spoke to that captain on the barge as you stated, how did the Kate lie from you then?
A. When I spoke to the captain of the barge to hail them, she was right alongside of the barge.
Q. The Kate had then crossed the bow, and was alongside of the barge?
A. Yes, sir.
Q. Did you see her alongside of the barge?
A. She was off the bow of the barge.
Q. When you saw her at that time I am speaking about, how far did you see her off from you?
A. She was about ten feet from the barge.
Q. How far from you, I asked—from your boat?
A. About thirty feet.
Q. Off how—bearing from your bow how?
A. Yes, sir.
Q. How did she bear from your bow when you saw her; did she bear one point, or two points, or three points?
A. About half a point.
Q. How did she then lay—across the river?
A. Yes, sir.
Q. Then at the time you so spoke she lay about half a point on your port bow across the river?
74 A. Yes, sir.
Q. Did the whole of the Kate lay to the north of you, or on your port side then?
A. Yes, sir.
Q. Before that she swung alongside of you?
A. When the collision occurred she was on our starboard bow, and we backed and——
Q. Had she swung alongside of you, or had she hung on your bow? Did she hang on your bow until you backed out?
A. Yes, sir.
Q. There were three of you in the pilot-house at the time?
A. Yes, sir.
Q. How many crew does your vessel carry?
A. Eleven men and two women at that time.
Q. Who were the crew below at that time—the men folks?
A. I most forget their names.
Q. How many of them were there?
A. Seven.
Q. When you speak of eleven, do you include yourself?
A. Yes, sir.
Q. Three of you were in the pilot-house together?
A. Yes, sir.
Q. Who was the fourth man, that below?
A. Mr. Pancost.
Q. When had you last seen him?
A. The evening before.

Q. Had you been talking before the pilot spoke to you?
A. No, sir.
Q. Hadn't had any conversation about anything?
A. No, sir; not at that time.
Q. When did you leave South Amboy?
A. We left South Amboy at half past one.
Q. The collision occurred when?
A. About twenty minutes of four; I didn't look at my watch, but I suppose that was about the time.
Q. You had been running about two hours and ten minutes?
75 A. Yes, sir.
Q. What is the distance from South Amboy to where you were?
A. About twenty-one miles, I suppose.
Q. What is the distance from there to New York?
A. About eight miles.
Q. Had you stopped for anything on the way, or slowed for anything on the way, up to time the pilot first spoke to you?
A. Not to my knowledge. I didn't remember that we had.
Q. Now, will you tell us what was the first that was said or done on board of your vessel? If it was the pilot spoke, let us hear what he said. No change in your course was made until he spoke?
A. No, sir.
Q. The first thing was that he said something. Now go on.
A. He drawed my attention——
Q. What did he say?
A. He said, "What is that?" or, "Which way is that boat going?" I ain't positive which of these two words.
Q. From what he said you drew the inference that it was a boat going in some direction that he saw?
A. Yes, sir.
Q. And at that time, to the best of your recollection, when you looked, she was about three lengths off?
A. About three and a half lengths off.
Q. And you continued to look how long—how long do you suppose before anything else was done?
A. After my attention was drawn?
Q. Yes.
A. About half a minute.
Q. Did you, when you looked, judge it to be a steamer of some kind?
A. No, sir; there was nothing to show us it was.
Q. Did you judge it to be? Do you mean to swear you didn't know it was a moving vessel when he called your attention to it?
A. No; I will swear I was satisfied it was something going or coming.
76 Q. It was a moving vessel, then?
A. Yes, sir.
Q. Did you believe it was not a steamer?
A. I expected it was a tow going ahead, from not seeing any lights on her.
Q. (By the Court.) You thought it was a tow coming ahead?
A. Yes, sir; because there was no lights on the boat to show it was anything coming.
Q. What lights do the boats carry?
A. They carry by law——
Q. I mean what they do carry. What do you carry?
A. We carried two side-lights—the bow and stern lights.

Q. How are the bow and stern lights shaded?
A. In a box.
Q. Shaded aft; that is, cut off aft?
A. The forward one is.
Q. And the other one is not?
A. No, sir.
Q. The high light is open all around?
A. No, sir; there are sides; there is glass in the back part of the box.
Q. You then saw something moving. What was next said or done?
Q. Did you express any opinion?
A. Yes, sir. I told Mr. Parrisen that I thought it was Henry going out.
Q. That is, going to the eastward?
A. Yes, sir; coming to New York.
Q. (By the Court.) Before or after your whistle was blown?
A. Before.
Q. What did he do then?
A. He ported his helm.
Q. Did he port before he whistled?
A. Yes, sir.
Q. How much did he port?
A. I did not take notice how much; I didn't notice how many turns he ported on the wheel.
77 Q. How long did he run on that port-helm?
A. He hove it over after he blowed.
Q. Before the blow?
A. About half a minute.
Q. Then he blew?
A. Yes, sir.
Q. Had you ascertained or come to any different judgment at the time you blew the whistle than you had before?
A. About the boat going ahead?
Q. Yes.
A. No, sir.
Q. You hadn't ascertained any different state of things when he ported his helm, had you?
A. About the boat going ahead? No, sir.
Q. When you had your attention first called to it, you considered it a little on your port bow?
A. Yes, sir.
Q. Did you come to any different conclusion about the vessel up to the time the two whistles were blown?
A. No, sir.
Q. Had you seen any object of any kind up to the time the two whistles were blown?
A. I saw the three boats.
Q. When did you first see the three boats?
A. When my attention was drawn by the pilot.
Q. What boats did you see?
A. I saw a light boat and a schooner, and the other appeared to be a loaded boat.
Q. You are certain about that—that you saw that when your attention was first called?
A. Yes, sir; I am certain of that.
Q. And you continued to see them up to the time of the collision, I suppose?

A. Yes, sir.
Q. Did you hear the puffing of the steamer?
A. No, sir.
Q. This Kate—did you ever see her before?
A. Yes, sir.
Q. High-pressure boat isn't she?
78 A. I don't know whether she is or not.
Q. You have seen her and don't know?
A. No, sir.
Q. Do you know any of those tugs of that size that are low pressure?
A. I don't know anything about them.
Q. Do you mean to tell me that you know any tug of the size of the Kate that is a low-pressure boat?
A. I have seen low pressure——
Q. Tell me one tug of the size of the Kate that is a low-pressure boat.
A. I can't do it.
Q. And you mean to swear that on that night you didn't hear the puffing of the tug?
A. Yes, sir, I will swear.
Q. You didn't hear her up to the time you got up to her?
A. No, sir.
Q. Got good ears, I suppose, and can hear?
A. I have got pretty good ears—yes, sir.
Q. Was the light that you saw between you and the three boats, or was it on the three boats?
A. I couldn't tell.
Q. Can't form any judgment where it came from, eh?
A. No, sir.
Q. Did you continue to watch that light?
A. Yes, sir.
Q. (By the Court.) You mean to say that you formed no judgment as to where that light was—never did form any judgment?
A. From the cabin window, where I first discovered it, I calculated it was on a tow going ahead.
Q. Will you answer me whether you considered it on the three vessels which you saw, or on some vessel between you and them?
A. On the three vessels.
Q. How far could you see a vessel that night without a light?
A. Well, at that time we could, I should think, about a quarter of a mile.
79 Q. Now, you had got your helm ported, you had made your signal, how long between that time and the time you heard the whistle?
A. The two whistles?
Q. Yes.
A. About a minute.
Q. You think it was about twice as long (no matter whether it was minutes or seconds) from the time you whistled until the time you heard the two whistles as it was from the time of your porting to your whistles?
A. Yes, sir.
Q. You give these as the relative periods apart?
A. Yes, sir.
Q. You heard the two whistles, and what was said or done then?

A. He rang four bells to stop and back, and the little jingle-bell to back her strong, and sung out to the captain of the barge to starboard his helm.

Q. Had you seen the tug up to that time?

A. No, sir.

Q. When the whistles came, did you see the tug?

A. No, sir.

Q. Did you see the tug before she struck?

A. Never saw the tug till our bow-light shone on her.

Q. And never heard her until that time?

A. No, sir.

Q. Did you inquire on board your vessel whether any of the crew of the vessel had come on board of yours?

A. No, sir.

Q. Didn't make any inquiry of that fact?

A. No, sir.

Q. Did you go out of your pilot-house?

A. Yes, sir.

Q. Where did you go to?

A. On the platform alongside the pilot-house.

Q. Did you go anywhere else?

A. No, sir.

Q. How long is her main-deck above the water?

A. I have never measured, but I think it is about from the water up to her guard—it is, I think, about five feet; I won't be positive.

80 Q. Then there is a deck-house that covers the whole passage—that is, I mean from side to side—that lies within how far of the bow?

A. I have never measured, but I think about twelve feet of the stern.

Q. And that house is ten feet high?

A. Ten feet and a half high.

Q. And that forms the deck on which the pilot-house is?

A. The pilot-house then stands above it.

Q. Above that how far?

A. I never measured, but I think about five feet.

Q. And that is fifty feet, or between fifty or sixty feet back, you think, from the break of the deck-house?

A. Yes, sir.

Q. (By the Court.) Is there a passage outside of the house?

A. Yes sir, I think about a foot and a half; there is a passage from the wheel-house out around the bow, clear along each side.

Q. It is a place for passing lines and such things?

A. Yes, sir.

Q. The time you went to New Brunswick to see Mr. Reed, who went with you?

A. Nobody at all.

Q. Are you certain of that?

A. Yes, sir.

Q. Didn't he tell you when you went there that he had nothing to say about the matter?

A. Yes, sir; he said he had nothing to say—didn't know anything.

Q. Was not his statement to you that he was not going to talk to you?

A. He said he had nothing to say.

Q. Didn't he give you to understand that he would not talk to you?
A. He didn't give me no more to understand than that.
Q. He had nothing to say about it?
A. About the lights.

81 Redirect by Mr. Sanford:

Q. From the pilot-house to the bow is there any obstruction to the view?
A. No, sir.
Q. Clear?
A. All clear except one mast—a small mast.
Q. Was anybody present at the conversation between you and the deck-hand?
A. There was, sir.
Q. Who was it?
A. My brother.
Q. Henry Durham?
A. Yes, sir.
Q. (By the Court.) Did you touch the wheel yourself?
A. No, sir.
Q. You have no idea how much he rolled the wheel before you heard the whistle?
A. He rolled it, I think, about three turns to port before she blowed.
Q. And after the blow?
A. Then he hove it twice.
Q. When he blew he began to roll a little more?
A. Yes, sir.
Q. How much did he turn it before the blow?
A. I think he got about two or three turns more.
Q. And was struck before he got through rolling?
A. I think he was.
Q. (By Mr. Sanford.) That was after the two whistles were blown?
A. Yes, sir.
Q. (By Mr. Woodruff.) After you blew your single whistle did the pilot work his wheel?
A. He ported his wheel.
Q. He ported before the whistle, and when he blew his whistle he ported her?
A. Yes, sir; he ported more.
Q. When the two whistles were blown had he stopped porting his wheel?
A. Yes, sir; he stopped right away as soon as the two whistles blowed.

82 Q. And then what did he do with his wheel?
A. I sung out to him then to hard astarboard.
Q. Did he?
A. Yes, sir.
Q. (By the Court.) Explain what you did with your wheel from the first of it?
A. When we first discovered them our wheel was put aport, and in about half a minute the pilot blew one whistle and they ported more; and then about a minute after we blew, the other boat blew two whistles, and then I knew they wanted to keep the other side, and I stopped the boat and sung out to the captain of the barge to starboard his helm, so as to do all we could to save him.
Q. Have you stated all you did with your wheel now?

A. Our wheel was starboarded as soon as we blew our whistle.
Q. How many turns had you got before the blow?
A. I couldn't tell.
Q. Haven't you any idea how much? Hadn't he got his wheel hard aport?
A. No, sir; I don't think he had time.
Q. How many turns should you think he had time to make?
A. I don't think he had time to make more than three turns to starboard.
Q. Was your wheel at any time hard aport?
A. Yes, sir, I think it was; I think it got hard aport when we blew our whistle once; I didn't notice, but I think it was.

WILLIAM JAMES PARRISEN sworn on behalf of respondents.

Examined by Mr. Sanford:

Q. You are a pilot?
A. Yes, sir.
Q. How long have you been employed in that capacity?
A. About two years and a half.
Q. Have you been licensed during the whole of that period?
A. Yes, sir.
Q. And on what boat have you been running?
A. I have been on the Belknap first.
83 Q. How long?
A. Well, I don't know how long I was pilot of her.
Q. She is one of the Camden and Amboy boats, is she?
A. Yes, sir.
Q. And runs through the Kills?
A. Yes, sir.
Q. How long have you been on the Atlas—about how long?
A. We change around so that I cannot tell.
Q. You were on board of the Atlas at the time of this collision?
A. Yes, sir.
Q. And previous?
A. Yes, sir.
Q. Where were you at the time of the collision?
A. I was in the pilot-house.
Q. At the wheel?
A. Yes, sir.
Q. Where were you when you first discovered the approaching tow—where was the vessel, the Atlas?
A. We was about in the middle of the river.
Q. Off what point?
A. Our course is east by south half south.
Q. How far had you proceeded? Where were you in the Kills—off what point on the shore?
A. We was about in the middle of the Kills.
Q. Were you near Port Johnson, or near copper dock, or near Constable Point?
A. Close up to copper dock.
Q. What did you see?
A. I see nothing but the light that was on the schooner.
Q. What kind of a light?
A. White light.
Q. How did it bear when you first saw it?

A. On our port bow.
Q. How far off?
A. Well, I suppose about four lengths of our boat.
Q. Who was with you in the pilot-house?
A. James McKenna.
Q. Where was Captain Durham?
84 A. Sitting down behind him.
Q. McKenna was with you at the wheel?
A. Yes, sir.
Q. State what occurred further.
A. I says, "What is that?" Then the captain spoke. Says he, "I guess that is Henry going out with a tow."
Q. Who was Henry?
A. That was his brother. Then I ported my helm a little bit, and blowed my whistle once, to let him know which side I was going on. Then about a minute after that he blowed two.
Q. Who?
A. The tug.
Q. How did the sound come—from what point?
A. Well, it came from our port bow a little.
Q. When you blew your whistle did you do anything with the wheel?
A. Yes, sir.
Q. What?
A. I ported my wheel, as soon as I blew my whistle, hard over.
Q. Down?
A. Yes, sir.
Q. You heard the two whistles?
A. I let the rudder go amidships and hove it hard astarboard.
Q. What occurred when the whistles blew?
A. The captain sung out "hard astarboard" to the captain of the barge.
Q. What signal to the engineer, if any?
A. We had the four bells, and then the little bell to work her strong.
Q. How was your helm?
A. Our helm was astarboard on the collision.
Q. How much time elapsed between the whistle blown by you and the two whistles from the tug?
A. About a minute.
Q. And how much after the two whistles were blown before the vessels collided?
A. About another minute.
85 Q. When did you first see the boat and the tow so as to distinguish them?
A. I didn't see the tug until our head-lights shone on her.
Q. How was the tug then heading?
A. She was heading about south.
Q. Across your bow?
A. Across our bow.
Q. After the receipt of the signal by two whistles blown, was it possible, in your judgment, for the collision to have been avoided?
A. No, sir; we could not have avoided it.
Q. How did you strike?
A. Struck her on the starboard side.
Q. (By the Court.) What kind of a blow?
A. Glancing—quartering.
Q. Before or after the engine-house?

A. It looked to me after the engine-house.
Q. What was the motion of your wheels at that time?
A. Going back, sir.
Q. How did the tug pass, or how did you clear?
A. The tug swung a little bit to the starboard side and then across the bow to the port side.
Q. What further occurred?
A. Well, then I heard the captain of the tug a-hallooing to the engineer down below.
Q. Go on, if you please, and state the occurrence. Did the Atlas strike the tug?
A. No, sir.
Q. Only the tug?
A. Only the tug.
Q. Did you hear any calls?
A. No, sir.
Q. Did you hear any calls from your own boat?
A. Yes, sir.
Q. What?
A. I heard the captain halloo to the captain of the barge to hail him if they could help them anyways to get ashore if anything was the matter, but we got no reply.

86 Q. Suppose you had not had the answering signal of two whistles and had continued your course as adopted at the time when you discovered them, and after blowing your own whistle, would the collision have occurred, in your judgment?
A. I don't think it would. I think we would have went clear of the tow anyhow; the barge would strike the propeller.
Q. When you blew your one whistle, would you have cleared them if you had kept your course and they had kept their course?
A. If they had kept their course, they would have cleared us well enough.
Q. (By Mr. Donohue.) If neither had changed?
A. Yes, sir.
Q. Did you observe as to the lights on the tug and tow?
A. No, sir; I didn't see any light until our head-light shone on her, and then I saw a light that looked as if it was down on the deck by her engine-room.
Q. On the tug?
A. Yes, sir.
Q. Did you observe how the other light which you first saw was located?
A. Yes, sir.
Q. Where was it?
A. It was on the schooner.
Q. Where?
A. In the rigging.
Q. Did you see any other lights on the tug or the tow than the one in the rigging of the schooner and the one that was down by the pilot-house?
A. It was not down by the pilot-house; it was down by the engine-room.
Q. What distance were you from the Jersey shore at the time of the collision?
A. I don't know, sir; we was about in the middle of the river.
Q. Was there plenty of space?

A. Yes, sir, plenty of room.
Q. To the right, on that side?
87 A. Yes, sir.
Q. Did you notice the lights on the Atlas after the collision?
A. Yes, sir.
Q. How soon after?
A. Well, about fifteen or twenty minutes after.
Q. And how were they?
A. They were all burning, all I could see from the pilot-house.
Q. What could you see?
A. I could see the green light and red light and stern lights.
Q. How soon after the two whistles was it that the bells rung to slow and stop?
A. Right away.
Q. Instantly?
A. Yes, sir.
Q. And did you do it?
A. The captain did it.
Q. Was it possible, in your judgment, for you to avoid the collision after the two whistles blew?
A. No, sir; couldn't avoid it.
Q. It was too late to change the course?
A. Yes, sir.

Cross-examined by Mr. Donohue:

Q. You say you don't know how long you were on these different vessels. Weren't you discharged from the Atlas?
A. No, sir.
Q. Never have been?
A. No, sir; I was not discharged from the Atlas.
Q. What vessel were you discharged from in this company—any?
A. Discharged from one; that was on the barge Julia; that was before I was pilot.
Q. You were not discharged at all after this collision?
A. I was suspended once.
Q. When?
A. On the transport.
88 Q. After this collision?
A. Yes, sir.
Q. How long did you remain steady on the Atlas after this collision?
A. I remained on her; she laid up for awhile.
Q. How long?
A. I don't know how long.
Q. Was it a week?
A. Yes, it was five or six months.
Q. Have you been in this company's service ever since?
A. No, sir; I have been on the tug Perry for awhile after I was suspended.
Q. When did you go on the Perry?
A. I went on her in July.
Q. July of what year?
A. Last year—last season.
Q. How long had you been out of employment when you went on her?
A. About a month.
Q. When did you go back into the employ of this company?
A. I can't tell you that—the month.
Q. How long were you on the Perry?

A. I was on her about a month.
Q. No more?
A. A month and a half.
Q. No more?
A. No, sir.
Q. Now, when you first saw whatever this object was, did you take it to be a moving object?
A. Yes, sir.
Q. Did you take it to be a steamer of any kind and tow?
A. I thought it was going out; I thought it was a tow.
Q. You had some doubt about the circumstances attending it, because you had called the captain's attention, hadn't you?
A. Yes, sir.
Q. There was doubt in your mind as to which way the vessel was proceeding?
89 A. Yes, sir. I thought that the tow was going out, and it might go across.
Q. You called the captain's attention to it?
A. Yes, sir.
Q. Before you rolled your wheel to port, had the captain given you any opinion?
A. No, sir.
Q. How far did that port of itself change your course?
A. It didn't change our course any, because——
Q. Up to the time the whistle was blown, had it changed your course any?
A. Which whistle?
Q. Your whistle?
A. It had changed our course a little.
Q. How much?
A. I don't know. I suppose about a quarter of a point.
Q. But she had got on the swing?
A. Yes, sir.
Q. Was the barge's helm ported, or any orders given to her?
A. No, sir.
Q. Was your vessel loaded at the time?
A. No, sir.
Q. Light?
A. Yes, sir.
Q. Barge loaded?
A. Yes, sir.
Q. When you gave the whistle and ported still more than a quarter of a point?
A. No, sir; she had not gone off more than a quarter of a point.
Q. Did she get off more than that quarter of a point before the whistles were blown?
A. No, sir.
Q. When the two whistles were blown you say you starboarded?
A. Yes, sir.
Q. What change did you make to the starboard?
A. Didn't make any, as I know of.
Q. Now, the first order given to the man on the barge was to starboard?
90 A. To starboard his helm.
Q. There was not time on your vessel to make any change in your course—that is, so as to get her back to starboard at all?

A. No, sir.

Q. From the time you first saw this object to your whistle was about as long as from your whistle to the collision, I understood you to say?

A. Yes, sir.

Q. Now, the light which you saw which you spoke of was the light on the schooner?

A. Yes, sir.

Q. That is, you afterwards ascertained it to be; did you continue to notice it?

A. Yes, sir.

Q. Did you notice these vessels when you first saw the lights?

A. Yes, sir.

Q. You could see the vessels?

A. Yes, sir; the light shone so that you could see them.

Q. (By the Court.) Your light?

A. No, sir; their own light, on the schooner.

Q. Do you know the Kate?

A. Yes, sir.

Q. Is she a propeller?

A. Yes, sir.

Q. A small one?

A. Yes, sir.

Q. Can you tell me any vessel of her size that is a low-pressure boat?

A. No, sir.

Q. She is high-pressure?

A. Yes, sir, I guess so; I don't know.

Q. You have seen her running?

A. Yes, sir.

Q. And yet your memory won't enable you to tell whether she is a high-pressure boat or not?

A. No, sir.

Q. You didn't hear anything of her?

91 A. No, sir.

Q. Up to the time of her two whistles?

A. No, sir.

Q. (By the Court.) What do you mean by saying that you can't tell whether she is a high-pressure or not?

A. You don't take notice of that.

Q. Don't you know whether boats on the river are high-pressure or not?

A. No, sir.

Q. (By Mr. Donohue.) Do you mean to say on your oath that you don't know whether the Kate is a high-pressure boat or not?

A. Yes, sir.

Q. How often have you seen her?

A. A good many times.

Q. Passed her in the Kills off and on?

A. Passed her sometimes.

Q. She is in that trade now, is she?

A. I don't know whether she is or not. I haven't seen her.

Q. How long since you have seen her?

A. I have not seen her since last summer.

Q. The first you saw of the tug was when your bow-light shone on her, and then you saw some light on her?

A. Yes, sir.

Q. And that was the first you had seen of that?
A. Yes, sir.
Q. And that was right on top of the collision?
A. Yes, sir.

JAMES W. MCKENNA sworn on behalf of respondent.

Examined by Mr. Sanford:

Q. You were employed on the Atlas at the time of this collision, were you not?
A. Yes, sir.
Q. In what capacity?
A. As a deck-hand.
Q. How long have you been on board of her?
A. I was on board of her, from the time I hired until I quit, seven months.

92 Q. How long ago did you quit?
A. I don't exactly know.

Q. How long before the collision had you been on board of her—about how long?
A. I was from July until the time of the collision.
Q. That was in March, 1868?
A. Yes, sir.
Q. From the previous July in the employ?
A. Yes, sir; excuse me one minute—I was on the Belknap about three months, and then changed to the Atlas.
Q. Both being boats of the same line?
A. Yes, sir.
Q. Where were you on the Atlas at the time of the collision?
A. Standing on the starboard side of the wheel.
Q. What did you see prior to the collision?
A. Well, I saw a dark object ahead; I couldn't tell exactly what.
Q. How did it appear—how did it bear?
A. It bore ahead, and a little on our port bow.
Q. What did you think it was?
A. Well, I supposed it to be a vessel.
Q. Did you see any lights?
A. I saw a small, dim light, as I supposed, in the schooner's rigging, well on our port bow.
Q. (By the Court.) How much on your port bow?
A. I should suppose, the barge being alongside, it was about ahead of the barge.
Q. How much off your port bow?
A. Well, it bore about. I should suppose, on the outside of the barge.
Q. Where were the vessels at that time?
A. The vessels were ahead and on our port bow.
Q. Where was the Atlas at that time?
A. The Atlas was in the middle of the Kills.
Q. And about how far off was the dark object which you saw ahead?
A. Well, I should take it to be between three and four lengths ahead.

93 Q. What occurred?
A. The pilot asked the captain, "What is that?" I think, or something to that effect. The captain riz up and said, "I guess it is Henry going out of the Kills."
Q. What further?

A. Then the pilot blew his whistle once; or, in the first place, we commenced heaving our wheel aport; the pilot blew his whistle, and soon after his whistle was blown once we got two whistles.

Q. Had the vessel commenced moving to the right?

A. I think she had before we heard the opposite whistle; then we got two whistles from the opposite vessel; the captain, he pulled four bells—struck the gong four times—and rung the gingle-bell on top, to run the engine strong.

Q. What were you doing?

A. Heaving the wheel.

Q. (By the Court.) How?

A. We was heaving the wheel starboard.

Q. How did you come to do that?

A. When they blew the two whistles we concluded to go on the other side.

Q. (By the Court.) You heaved the wheel yourself, didn't you?

A. Yes, sir.

Q. How many turns had you got it?

A. We had hove it pretty well over.

Q. Were you heaving the wheel at the time of the blow?

A. Yes, sir.

Q. (By Mr. Sanford.) How many turns had you got it before you struck?

A. We hove the wheel right hard over starboard.

Q. (By the Court.) How many turns does it take to get it over?

A. I don't know exactly how many turns it takes to get it over.

Q. Can't you tell about?

A. No, sir; I don't know exactly how many turns.

Q. (By Mr. Sanford.) What was the motion of the side-wheels—the steamer's wheels?

94 A. The steamer's wheels went back immediately.

Q. Had they made any revolutions?

A. They had made about four revolutions backwards—when we struck, still working backwards.

Q. Did you notice how you struck?

A. We struck her somewheres about the engine-room—glancing that way, (illustrating.)

Q. How did the tug lie after the collision?

A. The tug lie on the starboard bow.

Q. And after the Atlas backed out, what was the position of the vessel?

A. After the Atlas backed out she drifted around on our port side.

Q. After the tug swung around to your larboard side, did you see any lights on her?

A. I saw a light on deck; I supposed setting aft of her joiner-work.

Q. Did you look particularly?

A. Yes, sir.

Q. Did you see any other lights aboard of her?

A. That was all the lights I see—only a reflection from the fire-room.

Q. No colored lights?

A. No, sir.

Q. Any on her tow?

A. Didn't see any.

Q. Now, after you swung clear, what happened?

A. After the tow had swung ahead the captain got ahead a little with the Atlas and stopped.

Q. What further?
A. Then he hailed if they wanted any assistance.
A. Who did?
A. The captain hailed if they wanted any assistance. Got no answer. Then he hailed Captain Schenck on the barge Julia—I think that is her name, I don't exactly know. Captain Schenck hailed him twice or three times, I won't be positive which; no answer.
Q. Was there anything to hinder, so far as you could see, the vessels passing to the right?
A. No, sir; nothing.
95 Q. Was it possible after you heard the signal to go to the left—the two whistles—to change your course and avoid the collision?
A. No, sir; there was not time.
Q. What course was the tug running at the time—the Kate?
A. The tug was running, I think, about south.
Q. Across your bow?
A. Yes, sir.
Q. Did you notice your own lights at the time of the collision, or about the time?
A. Yes, sir; I noticed them immediately after we came together.
Q. How did you happen to do that?
A. To see whether they were burning or not, because it was my business.
Q. Did you examine immediately after the collision to see whether they were burning?
A. Yes, sir.
Q. What was the result of your observation?
A. My observation was the two lights on the side-wheel houses were burning.
Q. And how with respect to the others?
A. The stern-lights were burning also.
Q. You said it was your duty to take care of them?
A. Yes, sir.
Q. Did you light them before leaving port?
A. Yes, sir.
Q. All of them?
A. No, sir; two side-lights; the stern-light belonged to another man.
Q. Did you see those lights afterwards?
A. Yes, sir.
Q. After leaving Amboy?
A. Yes, sir.
Q. When?
A. I looked at them several times coming up the Sound.
Q. (By the Court.) You ran up with them in the same condition that they were at the time of the collision?
96 A. Yes, sir.
Q. Who took them down when you reached New York?
A. I did.
Q. What time did you get here?
A. I don't exactly know what time it was, but it was before daylight.
Q. Were they burning brightly when you took them down?
A. They were; and I blew them out.
Q. Had you interfered with them at all in the mean time after the collision?
A. No, sir.
Q. Are you still employed on the Atlas?

A. No, sir.
Q. Where are you now?
A. I am working on the dock in South Amboy.

Cross-examined by Donahue:

Q. In the employ of this same company?
A. Yes, sir.
Q. Now, the only light that you saw on this tug or her tow was this one light?
A. One light I saw, I supposed on the schooner's rigging.
Q. That was all you saw?
A. That was all the light I saw.
Q. What first called your attention to that approaching object, the tug and tow, or whatever it was—what first called your attention to it; the pilot speaking of it or yourself?
A. No; I saw a dark object on the water.
Q. Then your attention was called to it before the pilot spoke?
A. About the same time.
Q. Can you tell which occurred first?
A. No, sir; for it was near about together.
Q. You hadn't had time to call his attention to it?
A. No, sir.
Q. Was it your duty to call his attention to it?
97 A. Yes, sir; I should suppose it was.
Q. You saw this dark object. Could you tell whether it was a vessel?
A. No, sir; I could not exactly tell.
Q. It was as near ahead of the barge as could be, was it not?
A. Yes, sir.
Q. The captain says he saw three vessels; when did you see the three vessels?
A. I saw the three vessels when they came together.
Q. Not before?
A. No, sir.
Q. From what the pilot said, you thought he had some doubt about the proceedings of the vessel ahead, from the way he spoke to the captain?
A. Yes, sir.
Q. And the captain had been sitting down, doing what?
A. The captain was sitting down looking out of the window.
Q. He was aft of the wheel?
A. He was sitting a little to the left of the pilot—behind the pilot.
Q. Sitting abaft of the wheel?
A. Yes, sir.
Q. The side the barge was on?
A. The same side the barge was on.
Q. The first thing that was done on board your vessel was to roll your wheel to port?
A. Yes, sir.
Q. Now, how much did she change on that roll of the wheel to port?
A. Well, she just commenced so swing.
Q. Was any order passed to the barge at that time?
A. No order whatever.
Q. Up to that time you said you had seen a dark object—was it the dark object you saw the light on, or was it the schooner you saw the light on?

A. It was on a dark object.

Q. You saw nothing but the thing on which the light was?

98 A. I saw a dark thing to the right of the light.

Q. Do you, or not, mean to say that that light was on the dark object; did you judge so at the time?

A. No, sir; I judged it was to the left of it.

Q. You saw something that was to starboard of that dark object that was going in the same direction with yourself?

A. Yes. sir.

Q. Could you tell whether it was behind or ahead of that dark object?

A. I think it was behind it; the dark object was between me and it.

Q. Whatever it was, you thought there was a dark object between you and the light; and beyond that there was something with a light on it?

A. Yes, sir.

Q. Did you think they were moving?

A. I didn't know whether they were or not.

Q. Did you form any judgment?

A. I formed a judgment that it was a-laying at anchor.

Q. Did you have any idea that that dark object was attached to it?

A. No, sir.

Q. Did you have any idea whether the dark object was moving or at anchor?

A. I had a kind of opinion that it was a tow.

Q. Towing your way?

A. Towing the same way we were.

Q. And your judgment was that between you and the thing which had the light on was a tow?

A. Yes, sir.

Q. Then you didn't think that that light was the tow?

A. No, sir.

Q. You didn't think that what was done because of the tow was in regard to that light?

A. It was done in regard to both.

Q. That was your judgment?

A. Yes, sir.

Q. But you hadn't heard the light spoken of?

A. No, sir; there was no light spoken of, only as I seen it myself.

99 Q. No one said anything about the light?

A. No, sir.

Q. You thought that that dark object that was to the starboard of the thing with the light was further away from you, did you?

A. No, sir; it was nearer to me than the light.

Q. How large did the dark object appear to be; small?

A. It seemed to be large enough for——

Q. How large was it—how large was this tug Kate?

A. She is a very small tug.

Q. The captain says she is fifty-two feet long; do you think that is pretty near correct?

A. I should not think she was any bigger than that.

Q. Fourteen feet wide, he says; should you think that was near the mark?

A. I think it is about right.

Q. You didn't express any opinion about the matter at that time?

A. No, sir.

Q. Nothing was said to you, nor did you express any opinion?

A. No, sir.
Q. And the first thing you did after was to roll your wheel?
A. Roll the wheel.
Q. Nothing was said about the light up to that time?
A. No, sir.
Q. You continued on, and you think you had got about swinging when you whistled?
A. Yes, sir.
Q. When you blew your whistle, from that time on how much did you swing, if any, or had you time to swing at all?
A. We hadn't swung but very little.
Q. Did you swing at all?
A. Well, I think we did.
Q. Give us an opinion of how much you think you swung.
A. Well, I don't think we swung more than half the width of the Atlas.
100 Q. That is, the bow of your boat didn't swing more than half the width of the Atlas?
A. No, sir.
Q. Until you got the two whistles?
A. Yes, sir.
Q. And it was about as long, you think, from the time you first had your attention attracted to this object—whatever it was—about as long from that time to your whistle as it was from your whistle to the collision?
A. Yes, sir.
Q. You say that you saw your side-lights; where did you go to look at them?
A. I went outside of the pilot-house.
Q. How far did you have to step from the pilot-house to see them?
A. About four foot.
Q. To the port side or the starboard side?
A. Either side.
Q. Four feet to the starboard side to see the green light?
A. Yes, sir.
Q. And four feet to the port side to see the port light?
A. Yes, sir; I did go that distance, but I can see them as soon as I open the door.
Q. Do you have to go out of the pilot-house to see them?
A. No, sir.
Q. How wide is your vessel from where the lights are?
A. I don't know, sir, how wide the Atlas is.
Q. The lights are set on the paddle-boxes, are they not?
A. Yes, sir.
Q. The paddle-boxes are the widest part of the boat?
A. Yes, sir.
Q. The pilot-house is in the middle of the boat?
A. Yes, sir.
Q. About where are the paddle-boxes?
A. About midships.
Q. How far forward of the paddle-boxes is the pilot-house?
A. I should judge about twenty to twenty-five feet.
Q. How wide is the pilot-house?
101 A. I should think somewhere between eight and ten feet.
Q. It sets right in a circle, doesn't it?
A. Yes, sir.

Q. Standing at the stern of your boat, to the port side of your stern, can you see the starboard light?
A. No, sir.
Q. Then the lights don't cross either bow?
A. No, sir.

Redirect, by Mr. Sanford:

Q. When you first saw this dark object, how did it bear; was it dead ahead or on either bow?
A. It was ahead on the port bow; off the port bow.
Q. When you saw the dark object and ported your wheel, if you had kept on in that course would you have cleared it?
A. Yes, sir.

WILLIAM J. PARRISEN recalled by Mr. Donahue:

Q. What relation are you to the captain?
A. My father-in-law, sir.
Q. Can you tell me how far it is across the paddle-boxes of the Atlas from side to side?
A. I think she is about twenty feet.
Q. What is the width of the boat?
A. I think she is about thirty feet wide.
Q. And how much are the paddle-boxes over the side of the vessel?
A. I don't exactly know how wide she is.

BENJAMIN PANCOST sworn on behalf of the respondent.

Examined by Mr. Sanford:

Q. You were on board the Atlas at the time of this collision?
A. Yes, sir.
Q. In what capacity?
A. Assistant engineer.
Q. You have been for some time employed in that capacity?
102 A. Well, no, not such a great while; I was fireman assistant there for four years and seven months.
Q. (By Mr. Donahue.) How long assistant engineer?
A. Well, I have been assistant engineer for about three years.
Q. Where were you on the vessel at the time of the collision?
A. I stood outside the engine-room door.
Q. Did you hear the bells?
A. Yes, sir.
Q. From the pilot-house?
A. Yes, sir.
Q. How many bells were rung?
A. There was four bells came in as quick as they could be rung, and the jingle-bell.
Q. Did you hear a whistle?
A. I can't say that I paid any attention to that.
Q. Where was the engineer?
A. The engineer was on deck; I was the one that handled the engine.
Q. What did you do?
A. As soon as them four bells came in I slowed her, unhooked her and backed her as quick as possible.

Cross-examined by Mr. Donahue:

Q. You were on deck, you say?

A. I stood right by the engine-room; all I had to do was to step off the deck right into the engine-room.

Q. Was there any one in the engine-room with you?

A. Yes, sir.

Q. Who?

A. A man by the name of John Culver.

Q. When you got in there what was the first thing you did in response to the bells?

A. I slowed her.

Q. What is that; how do you do that?

A. I shut the steam off.

Q. How long does it take to do that?

A. About as quick as you could wink.

Q. Does it take a second?

103 A. No.

Q. What next did you do?

A. I unhooked it.

Q. How long does it take?

A. As quick as I could lift the hook.

Q. Does it take a second to do that?

A. I suppose it would.

Q. Then what next did you do?

A. Then I backed her.

Q. How long does it take to back?

A. Before you get the wheels going around do you mean?

Q. Yes; how long before you could get the wheels to turning back?

A. Well, it would take a couple of seconds, I suppose.

Q. Do you think it would take about four seconds?

A. Yes, sir.

Q. Then she turns back full speed?

A. No, not full speed; certainly not.

Q. How fast does she turn back, then?

A. I don't know as I could form any idea; she was going very slow.

Q. When you started her back, how fast would she back? Could you make ten turns in a minute, backing in that way?

A. No, indeed.

Q. Could you make four?

A. No, I don't think you would. I don't think you would make over three.

Q. Can you tell me how many turns you did make, backing at that time, before you got the bell to stop?

A. Well, I think from about two to two and a half; that is, before the collision do you mean, or when he rung to stop?

Q. He rung all the bells that you have spoken of, and you obeyed them?

A. Yes, sir.

Q. How many turns did you make before you got the bell to stop backing, do you recollect?

A. Well, I suppose I must have made about eight or ten turns.

104 Q. Is that from recollection or from mere judgment now?

A. Mere judgment.

Q. You have no distinct recollection on the subject?

A. No, I don't; I didn't pay any attention to that.

Q. What was the next order you got after the stop-backing?

A. Then I had a bell to go ahead, then I had one to stop.

Q. (By the Court.) How many turns back did you make before the blow?

A. Well, I should suppose, as near as I can tell, about two to two and a half.

Q. You felt the blow?

A. Yes, sir; I felt the jar.

Q. Did the engineer come into the engine-room?

A. Yes, sir.

Q. When did he get in the engine-room?

A. He got in the engine-room right away after the occurrence.

Q. (By Mr. Donohue.) Your judgment in regard to the number of revolutions she made before the collision is like in regard to the other; it is now your judgment; you don't recollect at the time?

A. No; that is, do you mean at the time I felt the blow?

Q. Yes.

A. I should suppose, as near as I can tell, about two.

Q. You form the judgment in the same way, by judging back?

A. Yes, sir.

Q. (By the Court.) Who was in charge of the engine?

A. Mr.

Q. He was in charge—his watch?

A. Well, in fact, we didn't stand any watch.

Q. Who was responsible for the engine?

A. The engineer was responsible. He was right by there; he was on deck.

Q. (By Mr. Sanford.) How far from you?

A. He was on the main-deck.

105 Q. (By Mr. Donohue.) He was on this freight-house deck?

A. Yes, sir.

Q. (By Mr. Sanford.) Who was in charge of the engine at that time?

A. I was in charge of the engine at that time; at least I was working it at that time.

Q. (By Mr. Donohue.) How long had the engineer been out?

A. Well, I couldn't say.

Q. Where had you been when you went out?

A. Me—I was in the engine-room, and I just merely stepped out at the time the bells came in; it was warm, you know, and I just stepped outside of the engine-room door.

Q. (By Mr. Sanford.) Were you within easy reach?

A. Yes, sir.

Q. This collision was in March, was it not?

A. I believe it was in March.

Q. (By Mr. Sanford.) You didn't mean to say that the weather was warm, but that it was warm in there?

A. Yes, sir.

GEORGE R. SCHENCK sworn on behalf of respondents.

Examined by Mr. Sanford:

Q. You were captain of the barge Julia at the time of this collision?

A. Yes, sir.

Q. And were on board of her?

A. Yes, sir.

Q. Whereabouts?

A. Sitting in the pilot-house in a chair, the same as I am now.

Q. She was in tow of the Atlas?

A. Yes, sir.
Q. How attached?
A. Attached by a towing line, backing line, bow-breast line, and stern-bre'st line.
Q. You were at the wheel?
106 A. I was, sir. I was sitting in the pilot-house waiting for orders. I had no right to move the wheel unless I had orders from the captain of the steamboat.
Q. Whereabouts in the stream?
A. Well, I should judge we was about in the middle of the Kills, a little below the copper dock.
Q. (By Mr. Donohue.) You mean to the westward?
A. Yes, sir.
Q. What was the first intimation you had of any unusual condition of things?
A. The first I heard was the whistle blowing from the Atlas once.
Q. Well, what did you do then?
A. Well, I rose up to look out.
Q. Did you see anything?
A. I did not, sir; it was very dark; not then I didn't.
Q. What was the next occurrence?
A. Well, immediately after that I heard two whistles.
Q. And then, what?
A. Very shortly after that I heard the Atlas bells ring—gong.
Q. What further?
A. Well, I heard her bells ring to slow, stop, and go back. This little bell that they speak of I didn't hear; it was most too far off—it is a very large gong, and you can't hear it all over the boat.
Q. Go on, if you please, and state in the orders of their occurrence the events that you noticed.
A. Then the steamboat was backing, and the first thing that I discovered was this propeller Kate coming around the bow of the Atlas.
Q. What did you do with your helm?
A. Well, I starboarded my helm when Captain Durham told me to.
Q. When was that?
A. Just before we come together.
Q. How in reference to the two whistles that you heard?
A. I don't understand what you mean.
Q. Did he tell you to starboard your helm before or after the two whistles?
107 A. Immediately after.
Q. When you first saw the approaching vessels, what position did they occupy?
A. Well, I didn't see them, sir, until after the collision.
Q. Did you see any light?
A. I saw one very dim light after they came around; but before the collision I saw no lights, and didn't see them for I was where I couldn't.
Q. (By the Court.) Why couldn't you?
A. I was hidden from them, sir; the steamboat hid me from this tugboat where I sat—where I was sitting down in the pilot-house. I would have to look right across, sir, (illustrating.) I couldn't see them.
Q. You didn't see them?
A. I saw no light, sir.
Q. Did you see them afterwards?
A. That is what I saw. I saw this dim light after the collision and

they had swung around. I took this dim light to be in*to* the schooner's rigging. I wouldn't like to swear it was or was not.

Q. But you saw no other light on the tug or tow after they swung around?

A. No, sir.

Q. Would you if they had had any?

A. I should think I would. When I went out to the forward end of the barge I think I could have touched her with a thirty-feet pole. I saw no light except this light that I took to be in the schooner's rigging.

Q. What did you do next?

A. Then I came back and went to go towards the pilot-house, and Captain Durham told me to halloo on board of the Kate and see if we could render any assistance.

Q. Where were they then?

A. They had then swung off over our port bow. I suppose that was off thirty or forty feet at the time.

Q. Did you hail them?

A. Yes, sir; I hailed with all the might I could, and that is pretty loud. I'll warrant you could hear me on either shore.

108 Q. What did you say?

A. I hallooed "Hallo," aboard of the Kate," then I changed my tone and hallooed to the captain, which I am personally acquainted with. I got no answer from him or anybody else. Then I went back and told the captain that I got no answers, and he told me to go and halloo again, which was the third time I done so. I went back again and told him the same.

Q. How much time elapsed after the collision before you started ahead again?

A. Well, rightly I couldn't say; we was talking there to take up time—I couldn't tell exactly—I should think it was eight or ten minutes, as near as I could tell.

Q. Did you notice the light on board the Atlas?

A. I did, sir.

Q. When?

A. I noticed them immediately after we got going ahead again, also noticed them when I was talking to Captain Durham.

Q. When?

A. This was about the time I was hailing them, or a little after.

Q. What did you see?

A. I saw the wheel-house light burning very good, and two stern-lights. The bow-light I could not see, it was too far ahead.

Q. Did you have any lights on the barge?

A. Yes, sir.

Q. Where?

A. On the after-mast and on the flag-staff, hoisted about thirty-five feet from the deck.

Q. Was that burning?

A. Yes, sir.

Q. What kind of a light was it?

A. Well, it is a regular signal-lamp hoisted up by pen'ant halliards—into no box—just a naked lamp hoisted up by pen'ant halliards.

Q. How many men did you have on the barge?

A. Two men besides myself.

Q. Where were they?

109 A. Both of them were in the cabin at the time of the collision. When they felt the jar they run out.

Cross-examined by Mr. Donahue:

Q. You say you saw the side-lights?

A. Yes, sir.

Q. Do you mean to say you saw both her side-lights?

A. I saw them both from where I stood.

Q. Where did you stand on your barge?

A. Away on the forward end.

Q. On the deck or on the upper deck?

A. On the upper deck. I had no business on the lower deck.

Q. How far does that upper deck run to the bow—how near to the bow does it run?

A. It runs within twenty or twenty-five feet. I never measured it.

Q. Did your vessel and the Atlas, as they were going in, lie parallel with each other?

A. Yes, sir; nearly so, I think.

Q. The object was to get them parallel?

A. Yes, sir, as near as possible; sometimes we may be a little ahead of her, and sometimes she may be a little ahead of us. We generally lay parallel as far as possible.

Q. Keels parallel?

A. Yes, sir.

Q. And you mean to say you could see the green light from where you stood?

A. I could, away forward where I was—yes, sir.

Q. You heard nothing or saw nothing—had your attention not called in any way from the Atlas from the time you left South Amboy up to this time?

A. Well, I don't think that I had, sir.

Q. Have no recollection of having your attention called?

A. I don't think I had, sir.

Q. And the first thing that you recollect at this time was your own whistle?

A. Yes, sir; the pilot's whistle.

110 Q. Followed immediately by a second?

A. And when I heard the two I got up and looked.

Q. You didn't get up until you heard the second?

A. No, sir.

Q. The first you saw of either of them was on the tug—on the tow coming around the bow of the Atlas, as you say?

A. That would be very hard to answer, because it was dark, and not knowing what they was I couldn't tell.

Q. They were coming from the starboard side around the port side of the Atlas?

A. Yes, sir.

Q. Which boat did your vessel strike?

A. That I couldn't tell you, because I was not there.

Q. Did it strike any?

A. Yes, sir; I felt a jar, but I couldn't tell which one of the three boats struck her.

Q. It struck the boat on the side next the Jersey shore, whatever it was?

A. Yes, sir.

Q. How soon was that after the collision of the Atlas and the tug?

A. Well, it was probably a couple of minutes.

Q. Was it a couple of minutes.

A. I don't know; it was very shortly after; I didn't take the time, sir.

Q. Did you hear the blow of the Atlas and the tug?

A. No, sir; I did not.

Q. Did you hear them come together?

A. No, sir; I didn't hear any crush, or anything at all.

Q. Was it as far from the time that that first whistle blew to the second as it was from the time the second blew until they came around the bow of the Atlas?

A. I don't know that I could tell you that.

Q. What is your best judgment? Was it about as long from the time the first whistle blew up to the two whistles blowing as it was from the time of the two whistles blowing until you saw these boats coming in sight around the bow of the Atlas?

A. Well, I don't know. I couldn't tell exactly.

111 Q. Can you tell now that there was any difference between those two different periods?

A. Well, it must have been some three or four minutes.

Q. No, no, don't tell me how long it was; but from the time the first whistle blew to the second whistle, then from the time these boats came around the bow of the Atlas—were those periods of time the same, or were they different?

A. I don't understand that at all.

Q. This light that you saw was about how high up when you saw it?

A. Probably six or eight feet; it might have been a little higher, and might not have been quite as high.

Q. From the deck of the vessel?

A. I took it to be in the rigging.

Q. Six or eight feet up?

A. Yes, sir.

Q. And that is all the light you saw at any time?

A. All the light I saw with the exception of a light on this propeller, near her engine-room, but I don't know where it was.

Q. Did you know it was near her engine-room?

A. I judged it was from the appearance of the light.

Q. You say you hollered at the Kate. Did you know it was the Kate at the time?

A. Well, I kind of think I did.

Q. How did you know it?

A. Well, I have often seen her and passed her.

Q. Is she a high-pressure boat?

A. I don't know anything about that. I should judge she was, but I don't know.

Q. You have no recollection?

A. No, sir.

Q. And yet you knew it was the Kate?

A. I could tell by her looks, that is all; she had a peculiar kind of a pilot-house.

Q. It was not too dark to see that—to see her peculiarities?

A. What made me know it was the Kate more than anything was Captain Durham told me it was the Kate.

112 Q. When did Captain Durham tell you so?

A. He told me so while I was there. I heard him mention it was the Kate.

Q. Was that before the collision?

A. No, sir.

Q. Was it before he asked you to hail?
A. Yes, sir, I think it was; I think I asked him.
Q. You got your information in that way?
A. Yes, sir.
Q. Did you make any inquiries as to finding out whether there was anybody from the Kate on board of your boat?
A. No, sir.
Q. Which was farthest ahead, the barge or the Atlas?
A. I think the barge was a few feet ahead of the Atlas.
Q. (By the Court.) I understand you to say that when you heard the whistle you stepped up and looked out.
A. Yes, sir.
Q. And you could not see anything?
A. I could not see anything then.
Q. And you didn't see anything until the collision?
A. I didn't see anything until after the collision and they swung around.
Q. And you kept standing there?
A. Yes, sir.
Q. Was you standing up when the two whistles were blown?
A. Yes, sir.
Q. Could you judge by that sound which way it came from?
A. Well, I couldn't exactly; it might be straight ahead.
Q. Of you or the steamboat?
A. Of the Atlas, as near as I could tell.
Q. You could not tell definitely enough to swear?
A. No, sir.
Q. (By Mr. Donohue.) I understood you to say you got up when the two whistles blew.
A. When one of the whistles blowed I got up, and I heard the two blow when I was standing up.
113 Q. (By Mr. Sanford.) Could you see across the bow of the Atlas from your position in the pilot-house?
A. I don't know; I think I could.

CHARLES S. THORPE sworn on behalf of respondents.

Examined by Mr. Sanford:

Q. Were you on board the Atlas at the time of this collision?
A. Yes, sir.
Q. Whereabouts?
A. I was in the after saloon.
Q. You saw nothing of the collision until after it occurred?
A. No, sir.
Q. Did you hear the whistle?
A. No, sir.
Q. Did you hear the bells?
A. I did, sir.
Q. What did you do?
A. I immediately went up on deck.
Q. Which deck?
A. The main-deck.
Q. That is the deck on which the engine-house is?
A. Yes, sir.
Q. Did you get up before the collision?
A. No, sir.
Q. The collision occurred before you could get up?

A. Just as I was on the stairs.
Q. You felt it?
A. I did, sir.
Q. What was the first that you saw after coming up?
A. The first I saw was these two boys off the tug-boat Kate.
Q. Did you see them get off?
A. No, sir; I saw them on the forward deck of the Atlas.
Q. After the Atlas had got under way, were you present at any conversation with those boys?
A. I were, sir.
Q. Where did it occur?
114 A. In the Atlas cabin—forward cabin.
Q. Who was talking with them?
A. Robert Walker.
Q. He was the engineer of the Atlas?
A. Yes, sir.
Q. What was said?
A. Mr. Walker asked him, says he: "Why was you running without your lights up?" The man spoke this way, "We had our lights up." And he looked so at the deck-hand; and the deck-hand said, "No, sir, the after light was up."

Cross-examined by Mr. Donohue:

Q. You heard the bells ring?
A. I did, sir.
Q. They all rung in a hurry?
A. They did.
Q. Where were you?
A. I was in the after cabin.
Q. How far from the stairs?
A. Just aft of amidships.
Q. (By the Court.) Where were you standing when the bells started you?
A. I was laying on the locker.
Q. How far from the foot of the stairs?
A. Twenty feet.
Q. (By Mr. Donohue.) Did you start for the stairs as quick as you could?
A. I did, sir.
Q. Did you get to the stairs before the collision occurred?
A. I got right on the stairs.
Q. Did either you or any one else report that you had got somebody from the Kate on your vessel?
A. I did not.
Q. Did you know of any one else doing it?
A. No, sir.
Q. Did you see where these men came from, or where they went to?
115 A. No, sir; I didn't see where they went to until after I got a line made fast, and then I saw them go in the cabin.
Q. What line?
A. The bow-line of the barge.
Q. It had parted?
A. Yes, sir.
Q. Had more than one line parted?
A. That is all I know of.

Q. There was one of the men trying to get on the barge?
A. I did, sir.
Q. Did you ask him what he was doing there?
A. No, sir.
Q. Did you prevent him coming?
A. No, sir.
Q. Did you tell him not to go on the barge?
A. I told him he could not get on that barge, because the doors was shut up. I told him there was orders to let no one go on that barge.
Q. You don't say nobody could go on at that time?
A. I didn't tell him that at all.
Q. If he had tried to get on would you have let him?
A. Certainly, I would let him.
Q. Then, why did you tell him he could not get on?
A. Because the doors were locked and he could not get on.
Q. Do you say that you would have let that man go on, notwithstanding the orders?
A. Yes, sir.
Q. And yet your orders were to let nobody go on?
A. It was the barge's men's orders to let no one go on.
Q. You knew that?
A. Yes, sir.
Q. Knew that no one would be let on by them?
A. I knew that no one would be let in them doors; they couldn't have got on the barge's upper deck from the guards of the boat.
Q. Couldn't they have got over the wheel-house?
A. They couldn't have got on the upper deck.
Q. How many were talking at that time when they were talking in the cabin?
116 A. There was three of us.
Q. Who were the three?
A. Myself, John Culver, and Robert Walker.
Q. Three of your men?
A. There was three of our men and the two boys.
Q. How many others around?
A. There was a lot of passengers; I don't know their names.
Q. The engineer said what?
A. He asked him—
Q. Asked who?
A. I don't know the man's name.
Q. Is he in court?
A. That is the man over there, (designating Mr. Taylor.)
Q. What was said?
A. Mr. Walker asked him, "What was you running without your lights for?" Says he, "We had our lights up," and he looked so at the other fellow.
Q. Who is the other fellow?
A. This fellow that sits by him, (designating.) Says he—he didn't say "We didn't have them up," or he didn't say he had them up—says he, "The after-light was up." That is all I heard him say.
Q. (By the Court.) Did you start for the stairs before the jingle-bell?
A. I started as quick as I heard the bells. They came just as quick as they could.
Q. It was not the jingle-bell that started you?

A. No, sir; I knew they would not ring the bells that way if there was not something up.

ROBERT WALKER sworn on behalf of respondents.

Examined by Mr. Sanford.

Q. You are the engineer of the Atlas?
A. Yes, sir.
Q. And were at the time of this collision?
A. Yes, sir.
Q. Did you see anything of it?
A. No.
Q. Where were you on the boat?
117 A. On the upper deck, right close by the crank.
Q. What was the first you heard of it?
A. The four bells and the jingle-bell.
Q. How did they strike?
A. As fast as they could.
Q. What was done?
A. The engine was reversed and commenced backing.
Q. Where did you go after the collision?
A. After we started ahead I went down, and the watchman of the boat told me that there was a couple of boys aboard from the Kate, and I went forward to see them.
Q. Who had charge of the engine of the Atlas?
A. The assistant engineer, at that time."
Q. Did you see these boys?
A. Yes, sir.
Q. Where were they?
A. In the forward cabin.
Q. Did you have any conversation with them?
A. I did.
Q. What was it?
A. I asked him what he was running for without the signal-lamp up? He said, "We had our signal-light up," and turned to the other one and said he, "Didn't we?" Said he, "No, the after light was up." Said I, "Where was you?" Says he, "I was down in the fire-room." I asked him where the engineer was, and he said he was down in the forward cabin, and he thought he was drowned: he hallooed and didn't get any answer. I asked the engineer where he was; he said, "I was back aft at the time."
Q. Did he say what he was doing?
A. I don't know whether he did or not.
Q. Did you go on deck after that?
A. I went up to tell the captain there was a couple of boys aboard.
Q. Did you look at the lights?
A. Yes, sir; the Atlas's lights.
Q. What did you see?
A. I saw the signal-lights burning and also the stern-lights.
118 Q. What do you mean by the signal-lights?
A. I mean wheel-house lights.

Cross-examined by Mr. Donohue:

Q. You say you went up after the conversation to tell the captain you had somebody on board—you didn't report before that?
A. No, sir.

Q. You were not sent there to ask them any questions, were you?
A. No, sir.
Q. You hadn't seen either of the other boats?
A. No, sir.
Q. Didn't know whether they had lights or not?
A. No, sir.
Q. No one sent you there to pump them?
A. No, sir.
Q. Which was the one you spoke of?
A. From their conversation, the one I spoke to was the fireman.
Q. You cannot now recognize him?
A. Of course not.
Q. That one, whoever he was, said "We had the signal-lights up, hadn't we?"
A. Yes, sir.
Q. Can't recognize which one he was?
A. No, sir.
Q. His reply was——
A. "No," the signal-light was not up; there was a light at the stern. He didn't say whether it was a light up at the stern, but said it was a light at the stern.
Q. You were on this upper covering deck when you heard the bells ringing?
A. Yes, sir.
Q. That was the first you heard?
A. Yes, sir.
Q. What did you do?
A. I stood there to look at the engine to see whether it would reverse.
Q. Did you go below?
119 A. Not until the engine began to work back.
Q. Then you went below?
A. Yes, sir.
Q. What had you gone on deck for?
A. I went up in the room to bathe my head. I had a violent headache.
Q. How long did it last?
A. I suppose it lasted perhaps an hour and a half or two hours.
Q. Had you got over you' headache before you had that conversation?
A. No, sir.

EPHRAIM B. CULVER sworn on behalf of respondents.

Examined by Mr. Sanford:

Q. You were employed on the Atlas at the time of this collision?
A. Yes, sir.
Q. In what capacity?
A. As watchman.
Q. Where were you standing when your attention was first directed to anything connected with the matter?
A. About fifteen feet of the stern of the vessel at that time.
Q. What circumstance first caused your attention?
A. The whistling and the ringing of the bells. I was in the engine-room at the time.
Q. Where were you standing when your attention was first attracted?
A. I was then in the room.
Q. That was before the collision?

A. Yes, sir; before the collision.
Q. And while there you heard the bell strike?
A. Yes, sir.
Q. What was done?
A. Well, the engine was stopped and backed immediately.
Q. What did you do?
A. I went forward. I knew something must be the matter, or I concluded——
120 Q. What did you see forward?
A. I was within, I suppose, about fifteen feet of the stem.
Q. Before you reached the extreme bow, the collision occurred?
A. Yes, sir.
Q. You kept on the bow?
A. Yes, sir. I went on—continued on.
Q. And where did she strike?
A. She struck her just abaft her engine-room door.
Q. On the starboard side?
A. On the starboard side—yes, sir.
Q. What position were the boats in on the river in respect to the sides—what position was the Atlas in?
A. We was bound down on our way to New York.
Q. How far from either shore?
A. Nearly midway, I guess.
Q. Did you look to see whether they had any lights on the tug or its tow?
A. Yes, sir.
Q. Did you see any?
A. No, sir—yes, I saw one sitting down on deck by the engine-room door.
Q. Did the tug Kate have any lights on her bow or stern that you saw?
A. No, sir.
Q. Or any side-light?
A. No, sir.
Q. Did you see any colored lights?
A. No, sir.
Q. Did you observe particularly with reference to that?
A. Yes, sir. I am a waterman.
Q. And noticed specially at the time?
A. Yes, sir.
Q. Did you look at the Atlas at the same time?
A. Yes, sir.
Q. And for the same purpose?
A. Yes, sir.
Q. And what did you discover there?
A. I discovered that our lights were burning.
121 Q. What lights?
A. The side-lights, the starboard and port.
Q. Where did you see them from.
A. From the upper deck.
Q. How did you get to the upper deck?
A. I went up by the ladder; it is the ladder that goes up by man-rope stanchions on either side; I went up by that.
Q. From the forward deck?
A. Yes, sir.
Q. When was that, with reference to the collision—how long after?
A. A few minutes afterwards.

Q. Did you hear any calls?
A. Yes, sir.
Q. From whence did they come?
A. From the captain of the Atlas. He asked the man whose watch it was on deck to sing out to see if they wanted any assistance; and the captain of the barge at that time to sing out if they wanted any assistance.
Q. Did any one come on board from the tug Kate?
A. Yes, sir.
Q. Who?
A. I don't know their names; they were two young men.
Q. Did you have any conversation with them?
A. Yes, sir.
Q. What was said?
A. In reference to their sailing without lights?
Q. What was said and who said it?
A. The one that was acting as foreman was wet; we asked him if he had fallen overboard; he said no, but the steam-pipe had burst and wet him with the steam. They were calling for the engineer that was below, and asked him if he had fallen overboard; he said no, the steam-pipe had bursted, and that had wet him. I asked him what he was doing without any lights up—sailing without any lights up—as I would not undertake to lie at the wharf without lights, much less when sailing.

122 He said that "We did have a light." The other one said "No, we did not." They agreed then that they had no light up except the one.

Q. (By Mr. Stillman.) What did he say?
A. The other one said that "We had no lights."
Q. (By Mr. Stillman.) Which was the one?
A. That was the young man there, sitting by you.
Q. Have you been in the court-room during the morning?
A. No, sir; I just got here as you called for me.

Cross-examined by Mr. Donohue:

Q. Were you one of the three that stood by when this conversation took place?
A. There was myself, Mr. Walker, and Charles Thorpe.
Q. Who was the man that did the talking to them?
A. I asked them these questions.
Q. Did Mr. Walker ask them any?
A. Yes, sir.
Q. The same questions?
A. Yes, sir; pretty much the same.
Q. Did you ask them separately?
A. I asked them first and he asked them afterwards.
Q. And he answered each time, did he?
A. Yes, sir.
Q. And the same thing was answered to your questions and to his?
A. Yes, sir.
Q. When you heard the bells ring you were where?
A. In the engine-room.
Q. What was your business?
A. Watchman.
Q. How far is the engine-room from the entrance to the deck-house?
A. I suppose probably about twenty-five feet.
Q. Twenty-five feet?
A. Yes; I am not positive about that.

Q. That is forward of the pilot-house or the engine-room?
A. The pilot-house.
Q. How much forward?
123 A. Well, I should suppose it was about six or eight paces.
Q. Isn't it fifty feet from the pilot-house to the forward end of this deck-house?
A. That I can't say; I have never measured it.
Q. You won't swear it is not?
A. No, sir; I can't say.
Q. But you went all that distance after the bells rung?
A. Yes, sir.
Q. Did you run?
A. No, sir; I didn't run, but I walked pretty lively.
Q. And when you got there was there any one forward with you?
A. I think I was the first one forward.
Q. You didn't report to the captain that these men were on board; did you?
A. No, sir; not as I reccollect.
Q. Where did this conversation that you speak of take place?
A. Between the fireman and deck-hand?
Q. Yes.
A. In the forward cabin?

THOMAS N. VANDERDECKEN sworn on behalf of respondents.

Examined by Mr. Sanford:

Q. You were on board of the Hurd at the time of this collision?
A. Yes, sir.
Q. And in the capacity of captain?
A. Yes, sir.
Q. Before the collision where were you?
A. I was aft, steering my boat.
Q. What did you observe about the time of the collision—what first attracted your attention?
A. The lights of the steamboat.
Q. How was the Hurd arranged in the tow?
A. She lay off on the starboard side of the two boats.
Q. At the extreme right?
A. Yes, sir.
Q. How far ahead was the tug?
124 A. Well, I should think the tug was not more than her own length off; I don't think she was over that.
Q. Attached by a hawser?
A. Yes, sir.
Q. Did you see these lights before or after her whistle was blown?
A. Before.
Q. What lights?
A. Well, I saw three—there appeared to be three lights; I knew it was a steamboat by her lights.
Q. How was she heading?
A. She appeared to be a heading—coming up about in this way; this steamboat was coming about so. [Illustrating.]
Q. (By Mr. Donohue.) Slightly across you?
A. Yes, sir.
Q. (By the court.) Facing across your bows, toward the Staten Island shore?
A. Yes, sir; that is the way she seemed to me to be standing.

Q. How was the tow heading?

A. The tow was a heading about the same as the steamboat.

Q. Towards the Jersey shore?

A. Partially towards the Jersey shore; we had just about got straightened up after leaving the dock.

Q. How far across had you got?

A. Well, we were a little more than half-way; some considerable more than half-way.

Q. How long was it after you first saw the lights that anything else occurred to attract your attention?

A. Well, I don't think it was over a minute.

Q. What then occurred?

A. I heard one whistle, and started to go forward; I hadn't got more than half-way.

Q. From what direction did it come?

A. It came from the pilot-house; that is, from the approaching steamboat; I didn't know what boat it was.

Q. Was there any immediate answer?

A. It was about, I should think, a minute—all of a minute—before I heard two whistles.

125 Q. From whence did they come?

A. From the Kate; I took it to be from the Kate. I had got about half-way when the two whistles blew.

Q. What further occurred?

A. Well, I thought it a kind of curious of hearing two whistles. I heard the two whistles, and in a very short time I heard the collision with the tug Kate. Previous to that I took notice how the Kate was working; she had altered her course some from the way we were agoing; she seemed as though she was a kind of heading off towards the Staten Island shore, a different course from what she was agoing when I first took notice of her; then the collision; in a very short time they hit mine.

Q. Who hit your boat?

A. I think it was the barge. I took it to be the barge.

Q. Had you changed your course?

A. No, sir, I don't think we had changed our course a bit; we hadn't changed our course.

Q. At the time when you heard the collision between the Atlas and the tug?

A. We hadn't changed our course.

Q. How long was it after the collision before your vessel sunk?

A. Well, I should think it was a half or three-quarters of an hour. I called for help and pumped, and got another boat away around—a coal boat; hauled a coal boat away around from the outside of the schooner alongside of me, and we took twenty or thirty barrels out of my boat; took them out on purpose to light her up.

Q. Did you have any light on the Hurd?

A. No, sir.

Q. Did you see any on the tug?

A. I saw one light on the tug.

Q. Where was it?

A. It seemed to be from her engine-room; it appeared to be from that. I couldn't see any light, nothing more than the shade of the light; it seemed to be from the door of the tug. She lay in that way so that I could see her light.

126 Q. After the tug blew the two whistles, was there time, in your

judgment, for the steamer to have changed her course to the left and cleared you?

A. No, sir; I don't think there was.

Q. If the tug had kept her course and the steamer had gone to the right when you heard the first whistle, would the vessels have collided, in your judgment?

A. I don't think they would.

Q. Was there anything to prevent your keeping to the right—to prevent the tug keeping to the right?

A. Not that I know of; I was not acquainted with the river; I didn't know how far they could go.

Q. How in regard to the distance between the vessels and the shore?

A. I thought there was room enough. I had no thoughts of their hitting me; I had no thoughts of it at the time.

Q. Was your position in the tow changed at all on the voyage?

A. How?

Q. The position of the boats.

A. No, sir; I don't think the position of the boats was changed any.

Q. From the time you left New York?

A. Oh, they towed me astern of the two boats, in the first place, from New York to New Brighton; we kept a running across the river every way. I told the captain at the time—I told him, says I, "I shan't go no further with you"—for I didn't like his talk exactly. When we started from New York, hauling out of the slip, he took hold of me, and he undertook to haul me about, and he pulled me rather hard; didn't seem to take a hold of me in the right way. I spoke to him about it; he gave a kind of evasive answer, that didn't seem to suit me; then he towed me astern of this schooner and started. He hadn't but one line out when we started, (that was a bow-line,) and after we got started I put on the other two lines, the spring-lines, so as to keep me steady. When we got to New Brighton I cast off, and told him I would not go any further. After we had laid there until about three o'clock, he said

"Well," said he, "I will take and tow you alongside, and every-
127 thing will go on well enough." Says I: "I have been towed a great many times, but I never was towed so before in my life."

I think I told him that if I hadn't hired I should not have gone any further, because he didn't seem to understand the business, and the captain of the steamer said he was just as good a pilot as was around, and so did the captain of the tow-boat, and finally I thought, well, I thought I was chartered and they had sent this boat a purpose for me, and of course I ought to go, and so I went on. They hauled me alongside, and I thought we was all right, and that we was going there straight.

Q. How long have you been engaged in the business?

A. I have been on the river off and on over twenty years; yes, twenty-five years, and I have towed with different boats, different tugs, and different steamboats.

Q. Were the hatches taken off of your boat after the collision?

A. Yes, sir.

Q. What did you do?

A. We took out twenty-five or thirty barrels. I think the captain of the tug; I won't be certain, but I know I went for help to take my hatches off in order to save the boat; I attended to my pump.

Cross-examined by Mr. Donohue:

Q. Have you got a suit pending with the Security Insurance Company about this?

A. No, sir, not at present.
Q. Have you got a difficulty with them about it?
A. They have not done right with me, but then that has nothing to do with it.
Q. Haven't you now got a suit pending against the Security Insurance Company for your loss in that boat?
A. I have sued the company.
Q. Isn't Mr. Stillman the attorney against you?
A. Yes, sir.
Q. Then you have got a suit pending?
A. I don't know as it is pending now myself.
Q. Will you, if you please, just put on that paper the position of those vessels as you said you saw them?
128 A. Yes, sir, I will do that. (Witness makes diagram, which is put in evidence, and marked No. 2.)
Q. Is this paper on which you have placed these vessels—is this to the best of your recollection the position of the vessels as you first saw them?
A. Yes, sir.
Q. That is, when you had your attention first called to the steamboat?
A. Yes, sir.
Q. Did they change that position or heading after that time, either of them?
A. The tug Kate did.
Q. How many points, if any, did the tug Kate so change her position?
A. Well, I don't know; I couldn't exactly state as to that.
Q. Can you state as to whether she did more than one?
A. Well, no, I don't know as it was; she changed her course, that was enough.
Q. Could you say it was over half a point?
A. I don't know as I could.
Q. Do you know Mr. Lawson?
A. I do.
Q. Did you make a statement to him?
A. I did.
Q. Didn't you state to him, sir, that at the time you left New Brighton the lights of your tug were all burning brightly?
A. No, sir, I guess not.
Q. You never made that statement?
A. No, sir, I guess not; I didn't make any such statement as that.
Q. Did you not state to Mr. Lawson that when you left the dock at New Brighton—that after leaving the dock at New Brighton you saw the tug's lights burning brightly?
A. No, sir; I don't think I did.
Q. Will you swear you did not?
A. Yes, sir.
Q. You swear you did not?
129 A. Yes, sir.
Q. Didn't you state to him that the first thing you knew of about that approaching vessel, was the one whistle?
A. Yes, sir.
Q. Didn't you tell Captain Reed that you would do all the injury to the insurance company that you could?
A. I don't know that I did say that.

Q. Will you swear you did not?
A. Yes, sir; I will swear that I did not.
Q. Didn't you say you would do all the injury to the Security Insurance Company that you could?
A. I said I would not do anything for them; I said I would not come across the river for that insurance company, or any other insurance company.
Q. Didn't you say you would do them all the injury you could?
A. No, sir; I did not.
Q. Do you know Mr. Mayer?
A. I do.
Q. Didn't you tell Mr. Mayer that at the time of the collision, and after the collision, the lights of the Kate were burning brightly?
A. No, sir; I don't think I ever did.
Q. Will you swear you didn't?
A. Yes, sir; I will swear I didn't; I will swear to my recollection I never told him.
Q. Did Mr. Stillman ask you to make a statement—this gentleman here?
A. Yes, sir.
Q. Didn't you tell him when he so asked you to make a statement about the matter, that you didn't know anything about it, and couldn't?
A. That I didn't know anything about what?
Q. About the collision?
A. No, sir; I didn't tell him any such thing; I handed him my statement—the statement I had made, and said I, "There is something that I have made that you can see that I have made it right out plain."
Q. What statement was it—what became of that statement that you speak of?
130 A. I think it is there.
Q. Is this it? (Exhibiting paper.)
A. No, sir; that was the statement that I made at the time.
Q. The statement which you speak of as having made is one in possession of the counsel for the respondent?
A. He just asked me for it and I handed it to him.
Q. That is before you were sworn?
A. Yes, sir.

Redirect by Mr Sanford:

Q. That is the statement you handed to Mr. Stillman at the time?
A. Yes, sir.
Q. (By Mr. DONOHUE:) Can you mark on this paper, (No. 2,) the outline of the shores?
A. No, sir.
Respondents rest.

Testimony in rebuttal.

GUILFORD MAYER sworn for libellants.

Examined by Mr. Donohue:

Q. What is your business?
A. I am inspector for the insurance company.
Q. Do you know this last witness that was sworn here?
A. Yes, sir.
Q. Do you remember any conversation with him in regard to this collision?

A. I do, shortly after—the next day.
Q. Was the subject of the lights of the Kate spoken of?
A. That was the thing I first approached him about.
Q. Well, what did he say?
A. He told me he saw the boy trim the lights alongside the dock before they started, and they were burning brightly—one of the deckhands.
Q. Did he say when they were burning brightly?
A. Immediately after they started from the dock.
131 Q. Did he say whether he could see the lights after that?
A. He was astern with the hawser and couldn't see the lights.

Cross-examined by Mr. Sanford:

Q. (Handing card to witness.) Is that your handwriting?
A. Yes, sir.
Q. What did you do with it?
A. Gave it to the captain when I wanted him to come and see me.
Q. Who is Mr. Buckout?
A. Vice-president of the Security Insurance Company.
(Card marked "No. 3" and put in evidence.)

FERDINAND REED recalled for libellants.

Examined by Mr. Donohue:

Q. You have already been sworn?
A. Yes, sir.
Q. Did you have any conversation with Mr. Vanderdecken?
A. Yes, sir.
Q. What did he say in regard to what he would do—or wouldn't do?
(Objected to.)
Q. What did he say?
A. The twenty-third day of January I called over to him and told him he was wanted over to the Phœnix Insurance Company; he said he would "be damned" if he would go over there or do anything for them; he would do all against them he could.
Q. He didn't go—did he?
A. No, sir; Mr. Taylor was with me as a witness.

BENJAMIN F. TAYLOR recalled for libellants.

Examined by Mr. Donohue;

Q. You heard what was said here about a conversation in the forward cabin of the steamboat Atlas?
132 A. Yes, sir.
Q. Now state what that conversation was.
A. As I said before I don't recollect that we had any conversation at all.
Q. Do you recollect to have told any one that your lights were not up?
A. No, sir.

Cross-examined by Mr. Sanford:

Q. How old are you?
A. Twenty-one years old last November.
Q. Have you any license as an engineer?
A. No, sir; I ain't an engineer.

JAMES M. REED recalled for libellants.

Examined by Mr. Donohue:

Q. Do you recollect the conversation in the forward cabin?

A. No, sir.

Q. Did you ever state that your lights were not up?

A. No, sir.

Q. Did Taylor in your presence ever state that your lights were not up?

A. No, sir.

Policy on the cargo of the Hurd and a payment under it considered in evidence. Testimony closed with the exception of the deposition of Mr. Lawson to be taken hereafter.

NEW YORK, *May* 1869.

To Your Honor:

DEAR SIR: I hope you will excuse me for writing these few lines to you. Dear sir, God knows how I prayed for strength that I might not say anything but the truth when I was put on the stand, but while on the way to Amboy last night, I thought it over and I was very sorry to find out that I made a mistake in the cross-examination in the way the Kate was heading when the collision took place, for I should have said S. W. by S. in place of S. by E., and the Lord knows how the sorryful tears went down my cheeks; and, dear sir, I could not feel satisfied till I wrote these few lines to you to tell you the mistake; forgive me, for the Lord knows that I only wanted to tell the truth, and may the Lord bless you and your family is the desire of your humble servant,

Capt. WILLIAM DURHAM,
of Steamboat Atlas.

FEBRUARY 28TH, 1870.

133 BENEDICT, J.

As to some of the facts attending this collision, there is no dispute; others are in doubt, and are to be gathered from a mass of contradictory and unsatisfactory testimony.

It appears that the Kate, a small tug, fifty-two feet long left, the dock at New Brighton on the day in question at about 3 a. m., having three vessels in tow upon a hawser, of which the canal-boat A. E. Hurd was the starboard vessel. The wind was light, and the night somewhat dark, but without fog. After getting clear of the dock at New Brighton the Kate, according to the statement of the libel, took a course about for Port Johnson, on the Jersey shore. She had not proceeded far before her pilot heard a single blast of a whistle, which at once fastened his attention upon a bright light approaching, which proved to be the steamer Atlas, bound down the Kills with the barge Julia in tow, upon her larboard side. Immediately upon hearing the single whistle, the pilot of the Kate gave two blasts of his whistle, at once stopped and reversed his engines, and starboarded his helm. Under the starboard helm the Kate swung to port, but had not time to change the direction of her tow before she was struck upon the starboard side by the stem of the Atlas, while the barge Julia, in tow of the Atlas, struck the Hurd and sunk her.

The Atlas, as it appears, was running at the rate of some ten miles an hour on a course down the Kills, and her first knowledge of the proxim-

ity of the Kate was noticing a light ahead, which was supposed to be on a tow also bound down the Kills. The pilot at once ported his
134 wheel to pass to the right, and blew a single blast of his whistle, but receiving the two blasts of the Kate in reply before he had materially changed the course of his steamer, at once hove his wheel hard astarboard, and also stopped and reversed his engines. Before he could stop his headway, however, he was in contact with the Kate.

As to these facts there can be no dispute unless it be as to the course of the Kate; but her course, if not as broadly across the river as stated, was certainly crossing that of the Atlas.

Upon these facts it has been strenuously argued on behalf of the Atlas, that the libel must fail, because the Atlas, in porting her helm, complied with the pilot rules of the supervising inspectors, while the Kate violated those rules, by omitting to port, and so caused the collision.

This argument is founded upon a misapprehension of the true rule of navigation applicable to such a state of facts.

The pilot rule of the supervising inspectors with the accompanying illustrations of what is called the fifth situation, is a rule which, if held applicable in all cases of vessels approaching each other in an oblique direction, is pregnant with danger. It embodies a manifest error which existed before the enactment of the international navigation regulations, and has even at times crept into interpretations of those regulations. This error has been the subject of much interesting discussion, and its dangerous consequences need not be explained here. They will be found clearly shown in Mr. Gray's "Remarks respecting the rule of the road for steamships," a pamphlet which has received the approval of the British Admiralty, Board of Trade, and Trinity House, as well as of the French government. (See § 39 and 40, p. 9.)

But the pilot rules of the supervising inspectors are controlled by the subsequent legislation of Congress in the enactment of the international navigation regulations of 1864. (Stat., vol. 13, p. 60.) Since the passage of those navigation laws, no rule of the supervising inspectors in-
135 consistent therewith can be effective. (See act of July, 1866, § vol. 19, p. 228,) and accordingly rule 2 of the pilot rules, which has been here relied on, in so far as it requires a port helm in all cases—manifestly inconsistent as it is with act. 14 of the international navigation laws—is of no effect.

Articles 14 and 18 of the navigation laws furnish the true rule of navigation applicable when vessels are approaching each other obliquely, and give to the vessel having the other upon her starboard side an election as to porting or starboarding, according to the direction of the respective courses. Under these two articles the responsibility of avoiding the Kate, in the present case, was cast upon the Atlas. She was at liberty to keep out of the way of the Kate by porting, or by starboarding, as the case required, and it was a fault in her to port, if starboarding afforded the only opportunity of avoiding the disaster.

As I view the case, however, it cannot be made to turn upon the correctness of the manœuvres of either vessel after they saw each other; for I consider it to be quite clear, upon the evidence, that there was then no time to make any material change in the courses. They could only stop and back, which they both did. That it was then too late to avoid the collision by changing the courses, is shown by the small effect which was produced by the action of the helms before the blow; by the fact that the Kate at once answered the one whistle by two; by the immediate stoppage of both engines; by the absence of all hails; by the contradictory statements as to the direction in which the two vessels

were moving, and by other circumstances which appear in the testimony.

The question of the case then is, by whose fault was it that those two tows failed to discern each other until they were thus close together? That the Atlas is chargeable with fault in this respect is clear, for it is undisputed that she was running through a thoroughfare in the night, without any lookout. The night was not so dark but what, with due care, approaching vessels could have been seen in time to avoid them. Witnesses for the Atlas say: "It had been pretty dark, but had lit up then so you could see quite a ways"—"could see lights plain
136 enough; a vessel without lights could be seen one-fourth of a mile." I have no doubt, therefore, but that, with proper care, the Kate, a high-pressure boat, could have been discerned in time to avoid her; for it is proved that she had a light at her flagstaff, while the schooner in her tow had a light in her rigging; and I am satisfied that the failure to discover the Kate until the vessels were so near that, although both engines were promptly stopped and reversed, they came together, was owing to the absence of a proper lookout on the Atlas.

In addition to the fault of running without a lookout, another fault is charged upon the Atlas, namely, that she did not remain by the Kate to render assistance to the injured vessels, but at once departed on her way, leaving the sinking vessels to shift for themselves.

Upon the evidence, putting the most favorable construction upon it, it is evident that the Atlas displayed no great solicitude in regard to the vessels—which she must have known to have been seriously injured—if she did not intentionally desert them.

But it is argued by the advocates for the Atlas that the subject of assistance is irrelevant to the question of damage. That is hardly so. The rules which courts of admiralty lay down often look beyond the mere question of remuneration for services rendered or for loss sustained, and are intended not only to do justice between the parties litigant, but to prevent loss of life and preserve the ships, in the welfare of which, as the instruments of commerce, the whole community is interested. Therefore it is that the merchants' shipping act of England (§ 33 schedule table C) provides that in case of failure on the part of a colliding vessel to render assistance, without reasonable excuse, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by her wrongful act, neglect, or default. By which act a proceeding to recover damages may almost be said to be, in certain cases, changed into a penal proceeding to punish an offense. (See note to amendment of merchants' shipping act, Maclachlan, Appendix, p. 22.)

No such statute exists in the United States, but courts of admir-
137 alty may with propriety consider the fact of deserting, without cause, a vessel which has been injured in a collision as a circumstance tending to show consciousness of fault; and as in the admiralty public policy may be considered in disposing of costs, (1 Coote, p. 63,) punishment for such an act may be inflicted by withholding or imposing them, as the case shall seem to require. (The Celt, 3 Hagg,, 321; The Caledonia, 1 Spinks, 23; The St. Lawrence, 7 Notes of Cases, 556.)

In the present case, the Atlas being found in fault, the circumstances attending her departure from the scene of the accident need only be referred to here as confirmatory of the opinion that she was in fault.

It is equally clear to my mind that the Kate was also guilty of negligence which conduced to the collision, and in the same particular, namely, want of a proper lookout. As before stated, the night was not so dark but what lights could with care have been seen in abundant

time; and, upon the evidence, it is manifest that the Atlas displayed bright white lights. I say nothing in regard to the side-lights either on the Atlas or the Kate, for the reason that I hold the collision not to have occurred by reason of any mistake of courses, but because the bright lights, which should be seen before the side-lights, were not seen by either vessel until the vessels were upon each other. It is true, the evidence shows that the Kate had a man on deck to look out, but it also shows that neither he nor the pilot saw the Atlas's lights till just before they struck. A negligent lookout is no lookout. For this reason, therefore, I hold the Kate as well as the Atlas to have been in fault.

This, then, is the case of a collision produced by the concurrent negligence of these two vessels, and the question next arising is as to the extent of the liability of these vessels respectively for the loss sustained by the cargo which was being transported.

If this were an action brought in behalf of the Kate against the Atlas, no doubt would arise upon this question, for the well-known rule of the admiralty is to apportion the damages between the two vessels when both are in fault.

138 But here the case is a different one from that presented where the action is instituted in behalf of one of the colliding vessels, and the damages are sought to be apportioned between the parties to the action, who are found to be each in fault. This action is in behalf of the owners of cargo laden on board the canal-boat A. E. Hurd, which boat was at the time being towed by the Kate; and it is instituted, not against the Hurd, which was the carrier, nor against the Kate, which had assumed the duty of towing the Hurd with proper care and skill, nor against the vessel which actually inflicted the blow, for that was the barge Julia, herself in tow of the Atlas, but it is against the Atlas, as one of the two colliding vessels responsible, by reason of the negligence of her master and crew, for the injury caused thereby.

It cannot, then, be pretended that any act or omission on the part of the owners of this cargo conduced to produce the collision. The shippers of the cargo made no contract with the Kate. Their contract was with the Hurd, and they could take no part in the employment or the management of the Kate. Neither did those in charge of the Hurd have any control over the navigation or management of the Kate. The tug was an independent principal, so far as this collision and this cargo was concerned, charged with the duty of avoiding the neglect which caused the accident, and responsible for the results of that neglect.

There is no room, therefore, for the application of the principles of the law of agency, and it cannot be held that the libellants are chargeable or identified with the neglect of the Kate, and for that reason subject to the same rule which would be applied to her in regard to the amount of damages.

Nor is this a case of joint negligence on the part of the Atlas and the Kate, in which the acts of the Kate in law, and by reason of a common design, the acts of the Atlas so as to render her responsible for all that occurred. The fault of the Kate, as well as that of the Atlas, was

139 one of omission; and there would be neither justice nor sense in saying that the omission of the Kate to have a lookout could be imputed to the Atlas, who knew nothing of the existence of such a vessel till she struck her.

In a court of common law, then, upon the facts of this case, an action against the owners of these two colliding vessels, founded upon an allegation of joint negligence, could not, as I understand the law, be properly maintained, and although in an action against either, in such

a tribunal the whole amount of the loss would be adjudged, the reason is because the courts of common law hold it to be impossible to determine, in such a case, the proportion of the loss imputable to each offender, and, therefore, from necessity, being permitted to consider legal liabilities only, give judgment for the whole amount in the one case, and in an action by one of the parties in fault refuse to permit any recovery whatever.

But while such is the rule of courts of common law, courts of admiralty, "where a mixture of public law and of maritime law and of equity are often found in the same suit," (Parsons vs. Bedford, 3 Pet., 447,) when the proceeding is to recover damages arising from a collision of ships—for reasons peculiarly their own—feel compelled to divide the loss.

In a court of admiralty the action may be instituted against both the colliding vessels, and the decree be against either one of them for the whole, or, "by reason of the great advantages which the admiralty has of being able to do so," (The Friends, 4 Moore, P. C. C., 322,) one-half the damages may be decreed against each; and the action may also be against one of two colliding vessels found equally in fault, and one-half the loss decreed as the proportion of loss properly chargeable to the vessel proceeded against. In this instance, for example, the present proceeding might have included the Kate with the Atlas, and such is the more common form of the proceeding, or the libellants might have joined with the owners of the Kate in an action against the Atlas;

(Coote, p. 11; The Commander-in-Chief, 1 Wall.; Williams &
140 Bruce, Adm. Prac., p. 67; The Hanover, 1851, Betts, J.;) or, if there had been an action by the owners of the Kate alone against the Atlas, and also an action by the owners of the Atlas against the Kate, all would have been heard together, perhaps even consolidated, (Coote, p. 27,) and such decrees made as the rules of maritime law and the course of admiralty require. (Sturges vs. Bayer; The Hector, 24 How., 110; The Catherine, 17 How., 177; Hay vs. Leneve, 2 Shaw, App. Cases, 395; The Anna Kimball; The Marion, and cases cited by Dr. Lushington in deciding the Milan, 1 Lush.; The Aurora, 1 Lush., 328. The Hector, 4 B. C. C., 200.)

If, then, in an action against one of two colliding vessels in behalf of another found equally negligent, a court of admiralty is competent to ascertain and adjudge the amount of damage chargeable to the neglect of the vessel proceeded against, I see no reason why it is not equally competent to do the same in an action like the present, nor why the same rule should not be here applied.

It will more clearly appear that such should be the law, if we advert to the reasons which are supposed to call for the application of the rule of apportionment.

This rule of the admiralty is too venerable and has been too often approved by great authorities, coming down to the present day, to admit of question or require defence. Its wisdom as applied to modern commerce appears fully demonstrated by the circumstance that when disturbed by the merchants' shipping act of England, passed in 1854, the rule proved to strong for statutory innovation, and it was found necessary to re-instate it in the merchants' shipping amendment act. (25 and 26 Vict., 63, 29.)

It is a rule of equity, but not of equity alone; it has also a foundation in expediency. In furtherance of equity it compels a party in fault to share in the loss arising therefrom, and it refuses to permit a party to be charged with the whole of a loss shown to have been caused by

another party as well. In the interest of commerce and the community at large, this rule, as also the rule of limited liability, (The Carl
141 Johan, cited in the Dandee, 1 Hagg, 113,) seeks to distribute somewhat those losses which so frequently attend the navigation of ships, and which result from a negligence on the part of masters and seamen, against which the most prudent owners cannot entirely guard, and which, owing to the imperfection of human tribunals, and the nature of the facts in dispute, may well be supposed liable to be sometimes cast upon the innocent; and it aims to increase care and skill on the part of navigators, in order to diminish, as much as possible, the risks of life and of property, which always attend navigation on the seas.

Thus Lord Denham speaks of the rule as "growing out of an arbitrary provision in the law of nations, from views of general expediency—not as dictated by natural justice, nor (possibly) quite consistent therewith." (Devaux vs. Salvador, 4 Ad. and Ell., 420.) So Judge Ware speaks of it "as in conformity with the spirit of the maritime law, which generally aims more at practical utility and the interest of navigation than at a logical and scientific deduction of general and abstract principles." And in the Sioto, (Ware Rep., 264,) he says: "The maritime law, from considerations of public policy, divides the loss." The rule is applied by Drummond, J., because under it "there would be greater caution and vigilance in navigation, and less effort and less temptation by corrupt and unfair means to misrepresent and distort facts." (The Swan, 6 McL., 295.) And the Supreme Court of the United States, by Nelson, J., says: "We think the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance in navigation." (The Catharine, 17 How., 178.) These considerations have, from a very early period, and among many nations, been deemed to be controlling, and to require of admiralty courts the adoption of the rule in question, and they appear to be equally applicable to the vessels and cargoes composing the tow, whether considered to be in law one vessel for the purposes of this rule, or whether considered to be separate and independent interests.

Applied to the vessels being towed, the rule tends to encourage
142 the employment of competent tugs, navigated by competent men, and will cause the men on the tows to be more watchful to note and correct as far as possible by their own vigilance any neglect in the crew of the tug, as they may often do in the matter of lookout, hails, &c. Applied in a case like this, it also works equity, for certainly there would be little justice in permitting these libellants to elect to charge the Atlas with the whole of this loss, which their own witnesses, called from the Kate, prove to have arisen from the fault of the Kate as much as from the fault of the Atlas. If the action had been instituted by the owners of the Kate to recover for the injury to this cargo, for which action the case of the Commander-in-Chief (1 Wall. R., 50) would be an authority, the liability of the Atlas upon this very claim would have been limited to one-half the amount of it. (See cases cited by Dr. Lushington in the Milan, the Bay State, Abbots' Adm. R., 241.) It is not easy to see how in equity the liability of the Atlas can be permitted to be doubled by instituting the suit in the name of the present libellants, and calling upon the crew of the Kate to prove the case.

It was entirely competent for the libellants to have originally proceeded against the Kate as well as the Atlas in this action and so recovered their whole loss. Furthermore, after the hearing had been had, opportunity was given to join the Kate, and it was declined without the sug-

gestion of any facts existing to prevent that course. It certainly would not be just to permit the liability of the Atlas to be doubled by this mode of procedure, and for no other apparent reason than to save the Kate from her share of reponsibility.

But it may be said the libellants are without fault, and should recover their whole loss, and the Kate may be sunk or beyond the reach of process, or of too insignificant a value to respond. No such facts appear, and not being suggested as a reason for declining the opportunity to join the Kate, they must be presumed not to exist; and whether the maritime law necessarily requires that the whole loss sustained by reason of a collision should be recovered in an action brought against one of
143 two offenders is the question under discussion; and it might well be said here, if the case required it, as it does not, that the risk of an inability to recover of the Kate recompense for loss arising from her negligence was a risk voluntarily assumed by the libellants, and against which the Atlas could in no way provide; and that the maritime law, looking to equity, and at the same time seeking to distribute losses of this character when they occur, and to prevent their occurence, if possible, by creating a sense of responsibility in the minds of all persons engaged in commerce, will not permit those risks to be shifted to the shoulders of a single one of the parties in fault, but leaves them upon the party by whom they were in the first instance assumed.

The rule of apportionment is a rule of limitation. It is adopted by maritime courts for the advantage of shipping, among other reasons. Its object is to restrict the liability of each ship in cases of collision by mutual fault to the injury arising from its own negligence. As to the ship herself, that proportion is always determined, and, from necessity, by an arbitrary rule of equal division. The same division is possible in regard to the cargo. The same reasons there exist for the limitation, and the same rule should be applied, certainly in a case like this, when no reason is shown for attempting to charge the whole loss upon one of the vessels.

Furthermore, the application of the rule of apportionment in actions brought by tows or their cargoes will tend to compel the bringing before one and the same tribunal all the parties whose rights and liabilities are involved in the controversy, and dependent upon the same facts; a result of no inconsiderable importance, when the nature of these controversies is considered.

These considerations, it is believed, justify the conclusion to which I have arrived, that in an action like the present the rule of appointment should be applied, and the recovery limited to one-half the amount of the damage to the cargo in question.

I have not thus far alluded to any adjudged cases where the question in the form here presented has been decided.
144 I am aware of no such case in the courts of this country, and no case has been here cited by either party. In the case of the Bay State (Abbott's Ad., 241) one-half the cargo was adjudged, but there the owners of the Bay State were the libellants; they could hardly, however, have been considered as owners of the cargo. The later case of the D. S. Gregory, which was an action for damages for injury to a passenger in a collision arising from mutual fault of each vessel—both being then able to respond—limited the liability of each to one-half the damages. I am not aware that the particular provision as to execution inserted in the decree in the case was a subject of discussion, and it could not have been deemed important, each vessel having ample security for its portion of the loss. The case of the Hanover, decided by

the learned Judge Betts, in 1851, is more nearly in point. There were cross actions, one in rem, brought for vessel and cargo, lost by collision—the other in personam—and both vessels being found equally in fault, the decree directed the damages of both parties to be ascertained and divided equally, but directed that "the value of the cargo is not to be included in the estimate unless the owners thereof have made themselves party to this action, so as to be concluded by its decree."

There is, on the other hand, a remark by Mr. Justice Wayne, in the case of the New Philadelphia, (1 Black, 76,) which should not pass unnoticed, although the case has not been relied upon as an authority here. There the action was against a tug, between which and the libellant a contract had been made to tow a boat with care and skill, and it may be that in such an action considerations arising out of the contract would require a decree for the full damages, as to which I am not called on here to express an opinion. But in that case the court finds as a fact that the tug was solely in fault. There was, therefore, no occasion to consider, and the court cannot be supposed to have intended to adjudicate upon the question here involved.

145 In the English admiralty this question, in substantially the same form here presented, has been adjudicated; and, after full argument and consideration, it was held in the case of the Milan (1 Lush., 404) that in an action brought by the owners of cargo laden on board of one of two vessels found to be equally in fault for a collision, against the other colliding vessel, the recovery in the admiralty must be limited to one-half the amount of the injury to the cargo. This determination, so far as I can ascertain, has been acquiesced in, and appears to furnish the rule of maritime law as now administered in the English admiralty. (McLacklan, Williams & B. Adm., p. 76; Lowndes' Admiralty Law of Collisions at Sea, p. 5.)

The importance of agreement upon questions of this class between two nations so closely connected in their commercial relations as England and America would of itself go far to justify the adoption by American admiralty courts, in cases like the present, of the rule of the English admiralty.

In accordance with these views, the decree will be that the libellants recover of the steamboat Atlas one-half of their loss by reason of the collision in the pleadings mentioned, and that it be referred to a commissioner to ascertain the amount.

146 At a stated term of the district court of the United States of America for the eastern district of New York, held at the United States court-rooms, in the city of Brooklyn, on Monday the 28th day of February, in the year of our Lord one thousand eight hundred and seventy. Present, the Hon. Charles L. Benedict, district judge.

THE PHŒNIX INSURANCE COMPANY }
vs.
THE STEAMBOAT ATLAS, &C. }

This cause having been heard and submitted upon the pleadings and proofs, and the arguments and briefs of the advocates of the respective parties appearing herein having been duly considered, and it appearing upon the proofs herein that the damages claimed by the libellants were caused by the mutual fault of the steam-tug Kate and the said steamboat Atlas:

It is now ordered, adjudged, and decreed that the libellants herein do recover against the said steamboat Atlas, &c., one-half of the damages

by them sustained by reason of the collision in the pleadings mentioned, and that said steamboat Atlas, her engines, machinery, &c., be condemned therefor.

147 And it is further ordered, that it be referred to one of the commissioners of this court, to ascertain the amount of the damages which the libellants are entitled to recover under the terms of this decree.

CHAS. L. BENEDICT.

Commissioner's report.

U. S. district court, eastern district of New York.

THE PHŒNIX INSURANCE CO.
vs.
THE STEAMBOAT ATLAS, HER ENGINES, MACHINERY, &c.

To the honorable Charles L. Benedict, judge of the district court of the United States for the eastern district of New York:

In pursuance of a decretal order of reference made and entered in the above entitled cause, by which it was referred to one of the commissioners of this court to ascertain the damages to which the libellants are entitled, in accordance with the terms of the decree in this cause, and report thereon to the court,

I, Samuel T. Jones, United States commissioner, to whom the matter was referred, do respectfully report:

That I have been attended on such reference by the proctors for the libellants and by the proctors for the claimants, and have taken and duly considered all the proofs offered before me on such reference, from which I do find and report as follows, to wit:

The value of the cargo referred to in the libel, at the port of New York, immediately prior to the collision herein, was $20,094.06, upon which the libellants, as insurers, (upon an abandonment to them by the insured,) paid

148 to the insured, April 3, 1868, the amount insured, being $19,500. The libellants received as proceeds of cargo saved, $8,842.28, less $1,285 salvage, expenses, &c., being $7,557.28, making total damages sustained by the libellants..... $11,942 72

Interest thereon from April 3, 1868, when the damages were adjusted, to the date of my report..... 1,674 30

Total amount of damages at date of report..... $13,617 02

Which is the whole amount of loss sustained by the libellants by reason of the collision in the pleadings mentioned. In accordance with the decree of the court, the libellants are entitled to recover of the steamboat Atlas one-half of such loss, to wit, the sum of six thousand eight hundred and eight dollars and fifty-one cents, ($6,808.51,) at the date of this my report. All which is respectfully submitted.

Dated Brooklyn, April 4, 1870.

SAMUEL T. JONES,
U. S. Commissioner.

(Endorsed:) U. S. district court. The Phœnix Insurance Company vs. The Steamboat Atlas, &c. Commissioner's report. Barney, Butler

& Parsons, proctors for libellants. T. E. Stillman, advocate. Presented to the court and filed and confirmed, nisi, four days, April 4, 1870.

S. T. JONES, *Clerk.*

Reference to ascertain damages.

THE PHŒNIX INSURANCE CO.
vs.
THE STEAMBOAT ATLAS, &C.

Mr. Woodruff appears for claimants.
Mr. Stillman appears for libellants.

Evidence for libellants:

149 GILFRED MAYER, sworn and examined for libellants, says: I reside in Brooklyn, and am the agent of the libellants. The libellants insured the cargo of the tug Kate, as stated in the libel.

The cargo was insured for $19,500, and was abandoned to the libellants as insurers on about the 1st of April, 1868.

Value of cargo insured was	$20,094 06
Amount of insurance as above	19,500 00
Part of property was saved in a damaged condition, and was sold for the net price of	8,842 28
Making the loss on sale	10,657 72
Wreckers' charges paid	1,285 00
Making entire damages of libellants by reason of collision and loss	$11,942 72

Cross-examined:

This cargo was sold April 3d, 1868, in New York City; it was sold to Star Linseed-Oil Company, of New Jersey, to be delivered. The amount we received was all the cargo was worth. We regarded it as a very good sale. It was sold at private sale. It would have brought very much less if sold at public sale.

The loss was adjusted April 3d, 1868, from which date we claim interest.

The damages being apportioned, the parties claim on this reference that the report should be for one-half of the entire sum of $11,942.72= $5,971.36, with interest from April 3d, 1868.

U. S. district court.

THE PHŒNIX INS. CO.
vs.
THE STEAMBOAT ATLAS, &C.

Exceptions to the commissioner's report in the above.

150 First. That the commissioner has reported but $6,808.51 as the libellants' damage, when he should have reported $13,817.02.

BARNEY, BUTLER & PARSONS,
For Libellants.

(Endorsed:) Phœnix Ins. Co. vs. The S. B. Atlas. Exceptions. Barney, Butler & Parsons, for libellants. Exceptions overruled April 6th, 1870. Filed April 6th, 1870.

At a stated term of the district court of the United States of America for the eastern district of New York, held at the United States court rooms, in the city of Brooklyn, on Thursday, the seventh day of April, in the year of our Lord one thousand eight hundred and seventy. Present, the Hon. Charles L. Benedict, district judge.

THE PHŒNIX INSURANCE COMPANY
vs.
THE STEAMBOAT ATLAS, HER ENGINES, MACHINERY, &c.

The report of Samuel T. Jones, U. S. commissioner, to whom it was referred to ascertain and report the damages of the libellants herein, having been made and filed, from which it appears that the whole amount of the damages which the libellants sustained were $13,617.02, and that in accordance with the terms of the interlocutory decree herein the libellants were entitled to one-half of their said damages, being $6,808.51, for which the said commissioner reported in favor of libellants; and the libellants having filed exceptions to such report, upon the ground that the entire amount of damages were not allowed and reported,
151 which exceptions have been overruled: Now, on motion of Barney, Butler & Parsons, proctors for libellants, it is ordered, adjudged, and decreed that the Phœnix Insurance Company, the libellants herein, do recover against the said steamboat Atlas, her engines, &c., one-half of the damages by them sustained by reason of the collision, in the pleadings mentioned, being the sum of six thousand eight hundred and eight dollars and fifty-one cents, together with two hundred and eighty-two $\frac{20}{100}$ dollars taxed costs, making, in all, the sum of seven thousand and ninety dollars and seventy-one cents; and that said steamboat Atlas, her engines, &c., be condemned therefor. And on like motion it is further ordered that the stipulators for costs and value on the part of the claimants herein cause the agreements of their respective stipulations to be performed.

CHARLES L. BENEDICT.

(Endorsed:) The Phœnix Insurance Co. vs. The Steamboat Atlas, her engines, &c. Final decree. Barney, Butler & Parsons, proctors for libellants. Filed and entered the 7th day of April, 1870.

District court of the United States for the eastern district of New York.

THE PHŒNIX INSURANCE COMPANY
against
THE STEAMBOAT ATLAS, HER ENGINES, &C.

152 GENTLEMEN: Take notice that the libellants herein intend to appeal from the final decree of the court in this cause.

Dated April 16, 1870.

BARNEY, BUTLER & PARSONS,
Attorneys for the Libellants.

To SAMUEL T. JONES, Esq.,
Clerk of said Court;
SANFORD & WOODRUFF,
Proctors for Respondents.

(Endorsed:) U. S. district court, eastern district. The Phœnix Insurance Co. against The Steamboat Atlas, &c. Notice of appeal. Barney, Butler & Parsons, proctors for libellants. Filed April 16, 1870.

Circuit court of the United States, eastern district of New York.

THE PHŒNIX INSURANCE COMPANY, libellants and appellants,
vs.
THE STEAMBOAT ATLAS, her tackle, apparel, and furniture; The Camden and Amboy Railroad and Transportation Co., claimants and appellees.

To the honorable the circuit court of the United States for the eastern district of New York:

The petition and appeal of the above-named appellants showeth, that on or about the 14th day of November, 1868, your petitioners filed their libel in the district court of the United States for the eastern district of New York against the said steamboat Atlas, her tackle,
153 apparel, and furniture, and against all persons intervening for their interest therein, in a cause of collision, civil and maritime, on which libel it is alleged and praying as therein contained, to which said libel your petitioners refer for its contents.

That thereafter the said Atlas having been seized by the marshal under process, was, on the 28th day of November, 1868, discharged from custody on claimants filing their claim and executing the necessary stipulations for costs and value.

That thereafter, on the 16th day of December, 1868, the said claimants filed their answer to said libel, alleging as therein contained, and insisting that the said steamboat Atlas was not liable for the damages claimed by said libellants, and praying that said district court would pronounce against said libel and condemn the libellants in costs, as will more fully appear on reference to said answer.

And thereafter the said cause came on to be heard before the honorable Charles L. Benedict, on the 30th day of April, 1869, and the hearing thereof was continued upon subsequent days, upon the allegations and proofs adduced by the respective parties; and after due deliberation thereupon the said judge, on or about the 28th day of February, 1870, made an interlocutory decree or order, bearing that date, that the damages claimed by the libellants were caused by the mutual fault of the said steamboat Atlas and a certain steam-tug called the Kate, and that the libellants should recover against the said steamboat Atlas one-half of the damages by them sustained by reason of the collision in the pleadings mentioned, and that it be referred to one of the commissioners of the said district court to ascertain the amount of damages which the libellants were entitled to recover under the terms of the said decree. That after proceeding with such reference before Samuel T. Jones, esq., one of said commissioners, he made his report to said court, bearing date the 4th day of April, 1870, on which he reported as the damages sustained by said libellants the sum of $13,617.07, and that in accordance
154 with the terms of the said interlocutory decree the libellants were entitled to one-half of their said damages, being $6,808.51, to which said report your petitioners duly filed their exception; which exception coming on to be heard before the Hon. Charles L. Benedict, was overruled. And afterwards, the costs and disbursements having been taxed at $282.20, a final decree was made, bearing date the 7th day of April, 1870, whereby it was ordered, adjudged, and decreed that the libellants recover against the said steamboat Atlas, he engines, etc., one-half the damages by them sustained by reasen of collision in the

pleadings mentioned, being the sum of $6,808.51, together with $282.20, taxed costs, making, in all, the sum of $7,090.71, and that said steamboat Atlas, her engines, etc., be condemned therefor, and that the stipulators for costs and value on the part of the claimants cause the agreements of their respective stipulations to be performed.

And these appellants are advised and insist that said decree is erroneous, inasmuch as the said libellants were entitled to and the said decree should have been against the said Atlas, her engines, etc., for the whole amount of damages sustained by your petitioners, the libellants in said action, and not for one-half the amount of said damages, to wit, for the sum of $13,617.02 and $282.20 costs, instead of $6,808.51 and $282.20 costs.

And your petitioners are advised and insist that the said decree is erroneous in this also: that it finds that the damages sustained by the said libellants by reason of the said collision mentioned were not caused wholly by the said steamboat Atlas, but by a mutual fault of the said Atlas and a certain tug called Kate.

For these and other reasons your petitioners appeal from so much and all that part of said decree which fixes the amount which libellants are to recover at $6,808.51 to the next circuit court to be held in said district, and on the said appeal they intend to have the cause heard anew in the circuit court on the pleadings and proofs in the district court, and on other proofs to be introduced in the said circuit court.

155 And they pray that the record and proceedings may be returned to the said circuit court, and that the said decree may be reversed, or such other decree thereon be made as to said circuit court shall seem just. And that the appellees, the Camden and Amboy Railroad and Transportation Company, may be condemned to pay to the appellants their costs and damages in the premises.

And your petitioners will ever pray.

BARNEY, BUTLER & PARSONS,
Proctors for Libellants and Appellants,
No. 111 *Broadway, N. Y. City.*

(Endorsed:) U. S. circuit court, eastern district of New York. The Phœnix Insurance Company, libellants and appellants, vs. The Steamboat Atlas, &c., The Camden & Amboy Railroad and Transportation Company. Petition of appellants. Barney, Butler & Parsons, attorneys, 111 Broadway, N. Y. Due service of a copy of within is hereby admitted, April 26, 1870. Sanford & Woodruff, proctors for claimants and appellees. Filed April 27, 1870.

156 *Bond for costs.*

Circuit court of the United States of America for the eastern district of New York, in the 2nd circuit.

THE PHŒNIX INSURANCE COMPANY, LIBELlants,
vs.
THE STEAMBOAT ATLAS, HER TACKLE, &C., The Camden & Amboy R. R. and Transportation Co., claimants.

Know all men by these presents, that we, the Phœnix Insurance Company, Stephen Crowell & Chancey Bedell, are held and firmly bound unto

the above-named claimants in the sum of two hundred and fifty dollars, to be paid to the said claimants, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the 5th day of May, in the year of our Lord one thousand eight hundred and seventy.

157 Whereas the above-named, the Phœnix Insurance Company, have prosecuted an appeal to the circuit court of the United States for the eastern district of New York, to reverse the decree rendered in the above-entitled suit by the judge of the district court of the United States for the eastern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named libellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

PHŒNIX INSURANCE COMPANY,
By STEPHEN CROWELL, *Prest.* [L. S.]
STEPHEN CROWELL. [L. S.]
CHAUNCEY BEDELL. [L. S.]

Sealed and delivered and taken and acknowledged this 5th day of May, 1870, before me.

SAMUEL T. JONES,
U. S. Commissioner.

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

158 Stephen Crowell & Chauncey Bedell, being duly sworn, each deposes and says that he resides in the city of Brooklyn, and he is worth the sum of five hundred dollars over and above his just debts and liabilities.

STEPHEN CROWELL.
CHAUNCEY BEDELL.

Sworn to this 5th day of May, A. D. 1870, before me.

SAMUEL T. JONES,
U. S. Commissioner.

Filed this 5th day of May, 1870.

159 District court of the United States, eastern district of New York.

THE PHŒNIX INSURANCE CO.
vs.
THE STEAMBOAT ATLAS, HER ENGINES, &C.

GENTLEMEN: The respondents herein intend to appeal from the final decree of the court in this cause.

Dated April 16th, 1870.

SANFORD & WOODRUFF,
Proctors for Respondents.

To SAMUEL T. JONES,
Clerk of said Court.
BARNEY, BUTLER & PARSONS,
Proctor for Libellants.

(Indorsed:) U. S. district court, eastern district of New York. The Phœnix Insurance Company vs. The Steamboat Atlas, her engines, &c. Notice of appeal. Sanford & Woodruff, proctor' for respondents. Filed April 16th, 1870.

160 Circuit court of the United States for the eastern district of New York.

THE STEAMBOAT ATLAS, HER ENGINES, &C., The Camden and Amboy Railroad and Transportation Company, claimants and appellants,
vs.
THE PHŒNIX INSURANCE COMPANY, LIBELLANTS and appellees.

To the honorable Lewis P. Woodruff, judge of the circuit court of the United States for the eastern district of New York, in the second circuit.

The appeal of the above-named appellants respectfully showeth that, on or about the 14th day of November, in the year eighteen hundred and sixty-eight, the above-named libellants and appellees, the Phœnix Insurance Company, exhibited its libel in the district court of the United States for the eastern district of New York, against the steamboat Atlas, her engines, boilers, tackle, apparel and furniture, &c., in a cause, civil and maritime, for the recovery of damages, in amount exceeding fifty dollars, alleged to have been sustained by said libellants as insurers of the cargo of the canal-boat A. E. Hurd from loss of said cargo by collision of said canal-boat A. E. Hurd with the said steamboat Atlas, in the Kills between Staten Island, in the State of New York, and the State of New Jersey; and that said steamboat Atlas was arrested
161 upon process issued upon said libel, and was discharged on these appellants filing their claim and entering into stipulations. And these appellants thereupon, on or about the sixteenth day of December, in the year eighteen hundred and sixty-eight, filed their answer to said libel in the said district court, praying that said district court would pronounce against said libel and condemn said libellants in costs and expenses, as by reference to said libel and answer may more fully appear.

That the said cause came on to be heard before the honorable Charles L. Benedict, judge of said district, on or about the 30th day of April and the 3rd day of May, in the year eighteen hundred and sixty-nine, upon the deposition and proofs taken in said cause, and the testimony and proofs adduced by the respective parties.

And the said judge, having advised thereon, on the 28th day of February, in the year eighteen hundred and seventy, made a decree in said cause, whereby it was ordered, adjudged, and decreed that the libellants above named do recover against the said steamboat Atlas, &c., one-half of the damages by them sustained by reason of the collision in the pleadings mentioned, and that said steamboat Atlas, her engines, machinery, &c., be condemned therefor; that said decree further ordered that it be referred to one of the commissioners of said district court to ascertain the amount of the damages which said libellants were entitled to recover under the terms of said decree, as by reference to said decree will more fully appear; that under said decree a reference was had to Samuel T. Jones, a commissioner of said district court, who reported

that the amount of damages to which said libellants were entitled, in accordance with the terms of the above-mentioned interlocutory decree herein, was the sum of six thousand eight hundred and eight $\frac{51}{100}$ dollars. And thereupon said libellants filed exceptions to said report, which exceptions were overruled; and that said report was confirmed by said district court. And that thereupon, on the seventh day of April, eighteen hundred and seventy, a final decree was made and pronounced in said cause by the said district court, wherein it was in
162 substance ordered, adjudged, and decreed that the said libellants do recover against the said steamboat Atlas, her engines, &c., one-half of the damages by them sustained by reason of the collision in the pleadings mentioned, being the sum of six thousand eight hundred and eight dollars and fifty-one cents, together with costs.

And these appellants are advised and insist that said decree is erroneous and should be reversed, inasmuch as said claimants, these appellants, are not liable for the damages by said libellants claimed to have been sustained, nor for any part thereof, and the decree should have been rendered in favor of said steamboat and against said libellants, dismissing said libel with costs.

And these appellants therefore appeal from the whole of the said decree in favor of the said libellants, the Phœnix Insurance Company, to the next circuit court to be held in said district, and on said appeal they intend to have said cause heard anew in the circuit court on the pleadings and proofs in the district court, and other proofs to be introduced in the said circuit court.

And these appellants pray that the record and proceedings may be returned to the said circuit court, and that the said decree may be reversed, and every part thereof, or such other decree thereon be made as to the said circuit court shall seem just; and that the appellees may be condemned to pay to these appellants their costs and damages in the premises.

SANFORD & WOODRUFF,
Proctors for Claimants and Appellants.

STATE OF NEW YORK,
Eastern District of New York,
City and County of New York:

Joseph T. S. West, clerk of Sanford & Woodruff, proctors for claimants and appellants, being duly sworn, says that on this 25th day of April, 1870, he served a copy of the foregoing appeal on Merrs. Barney, Butler & Parsons, proctors for libellants, appellees, by delivering
163 the same to and leaving said copy with a person in the office of said Barney, Butler & Parsons, and in charge of said office.

JOSEPH T. S. WEST.

Sworn to before me this 26th day of April, 1870.

SAML. T. JONES,
U. S. Commissioner.

(Endorsed:) Circuit court of the United States for the eastern district of New York. The Steamboat Atlas, her engines, &c., The Camden and Amboy Railroad and Transportation Company, claimants and appellants, vs. The Phœnix Insurance Company, libellants and appellees. Petition and appeal. Sanford & Woodruff, proctors for claimants and appellants. Filed April 26, 1870.

164 *Bond for damages & costs on appeal.*

Circuit court of the United States of America for the eastern district of New York, in the 2nd circuit.

THE STEAMBOAT ATLAS, HER ENGINES, &C., The Camden & Amboy Railroad & Transportation Company, claimants & appellants,
vs.
THE PHŒNIX INSURANCE COMPANY, LIBELLANTS & appellees.

Know all men by these presents that we, the Camden & Amboy Railroad and Transportation Company, Hoyt Sanford, & Alfred Decker, are held and firmly bound unto the above-named the Phœnix Insurance Company in the sum of fourteen thousand five hundred dollars, to be paid to the said the Phœnix Insurance Company, for the payment of which, well and truly to be made, we bind ourselves and each of
165 us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the 25th day of May, in the year of our Lord one thousand eight hundred and seventy.

Whereas the above-named claimants & appellants have prosecuted an appeal to the circuit court of the United States for the eastern district of New York to reverse the decree rendered in the above-entitled suit by the judge of the district court of the United States for the eastern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named claimants & appellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE CAMDEN & AMBOY RAILROAD
& TRANSPORTATION COMPANY, [L. S.]
By HOYT SANFORD, *Agent.* [L. S.]
HOYT SANFORD, [L. S.]
ALFRED DECKER. [L. S.]

166 Sealed and delivered and taken and acknowledged this 25th day of May, 1870, before me.

CHAS. W. NEWTON,
U. S. Commissioner.

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

Hoyt Sanford, of No. 585 Broome st., & Alfred Decker, of No. 111 East 37th st., being duly sworn, each depose and say, that they are each worth the sum of fourteen thousand dollars, over and above each of their just debts and liabilities.

HOYT SANFORD.
ALFRED DECKER.

Sworn to this 25th day of May, 1870, before me.

CHAS. W. NEWTON,
U. S. Commissioner.

Filed this 25th day of May, 1870.

167 Stated term.—November 8th, 1871.

Present, Hon. Lewis B. Woodruff, judge.

PHŒNIX INSURANCE CO., LIBELLANTS & APPELLANTS,
vs.
THE STEAMBOAT ATLAS, THE CAMDEN & AMBOY R. R. Co., claimant & appellant.

Cause called; counsel ready; hearing ordered. Barney, Butler & Parsons appear for libellants, appellants. Sanford & Woodruff appear for claimants & appellants. Cause argued by the respective counsel, and submitted.

168 Circuit court of the United States for the eastern district of New York.

THE PHŒNIX INSURANCE CO., APPELLEES & respondents,
vs.
THE STEAMBOAT ATLAS, HER TACKLE, &C., respondent & appellees.

Thos. E. Stillman and Chas. Donohue for the Phœnix Ins. Company; Chas. F. Sanford for S. B. Atlas.

WOORUFF, *Circuit J.*:

Without going into the detail of the evidence in this case, it must suffice to say that the negligence and mismanagement of the persons navigating the tug-boat Kate are fully established. On the testimony of those witnesses called from her by the libellants, that mismanagement was so gross as to *credit* of no excuse or palliation. Her
169 own seamen, as well as the master of one of her tows, proves that, putting out from New Brighton, on Staten Island, bound westwardly, up the Kills, she had crossed diagonally towards the New Jersey side, and had passed the middle of the Kills, and taken her course westward, still slightly quartering on the New Jersey shore. The witnesses generally say that he was two-thirds over towards the New Jersey shore. Some make it from one-half to two-thirds over, and one of her hands says she was within one hundred yards of the New Jersey shore, which was more than two-thirds of the whole distance. She was proceeding up the Kills when the steamboat Atlas came from the other direction. All of the witnesses agree that the Atlas was running in, or very nearly in, the middle of the Kills. This, if true, shows that
170 there was an erroneous assumption in the opinion of the court below, namely, that the Atlas had the Kate and her tows on her starboard side. It proves the contrary. This is not all. Every witness from the Atlas testifies positively that they sighted the Kate and her tows, or so many of them as they saw, on their port or larboard side. They are not contradicted by other witnesses, nor by any facts or circumstances not in harmony with their statement. I must regard that fact as proved beyond any doubt, and corroborated by the testimony from the Kate herself. It was therefore erroneous to say that the rule of navigation placed upon the Atlas the burthen and duty of keeping out of the way of the Kate but if the Atlas had been within the opera-

tion of that rule, it would in nowise save the Kate from the im-
171 putation of gross fault and negligence; for the same rule required her to keep her course, which she did not do nor attempt to do.

The Kills are narrow; not so narrow but that the vessels might pass each other with great ease in safety, but so narrow that vigilance and care were due from both vessels, and in the night season especially, and the pressure of the proper rules of navigation was more than usually stringent. In the course and direction of the two vessels, it is possible that if neither had done anything they would have passed without colliding. Such is the opinion expressed by some of the witnesses; but it is clear, I think, that their approach to each other was so nearly end on as to bring them under the rule which requires each to pass to the right. In accordance with that rule, the Atlas ported, and signified
172 her conformity to the rule by one whistle. The Kate disobeyed the rule. She assumed to say that she would go to the left, across the bows of the Atlas. She had no right to do this upon any ground. The proof as to the depth of the water shows that the suggestion that it would have been imprudent to draw a few feet nearer the New Jersey shore is a mere pretence; but, if not, then surely she had no right to assume that, in the short interval following her two whistles, the Atlas, which was acting in obedience to what the Kate knew to be her duty, could herself go there in safety, and in season to avoid her. If, in the judgment of her master, it was not prudent to incline more to starboard, she should not have gone the other way, but should instantly have slowed, and, by signals indicating inability
173 to conform to the rule, notified the Atlas of that judgment, thus leaving the Atlas the benefit of her own porting, and enabling her to pass, as according to the evidence she would, to the southward of her. If the Atlas had then failed, the Kate would at least have been free of the charge of thwarting her endeavour by her active misconduct. But her blowing of two whistles was a double assurance to the Atlas, first, that the Kate was about to cross to the southward, and also that, in the judgment of the navigator of the Kate, it was proper for the Atlas to arrest her swing to starboard and go to port. Instantly putting her wheel to starboard, the Atlas rang to slow, stop, and back, and it was done, but too late to avoid the collision.

174 It is said that the Kate, on her starboard wheel, had swung but little to the southward across the bows of the Atlas. It was to be expected that her witnesses, in view of the manifest fault in that manœuvre, and in the endeavour which, in obvious concert with the libellants, they make to exonerate the tug, would be tempted to make this representation. The proof in relation to their lights, greatly preponderating against them, further tends to impair confidence in their testimony; and in any view it is clear that their movement to the south—to their left—whether greater or less, and their wholly unwarranted arresting the southerly movement of the Atlas, were the fatal and inevitable causes of the collision. On the other hand, the instant the two whistles were blown by the tug, the Atlas did all it was possi-
175 ble to do to avoid the consequence of the mismanagement of the latter, namely, stopped and backed, and, by starboarding, made the best effort to turn (under some headway) to pass by the stern of the tug, then on her swing to the southward.

The case is, therefore, this: The vessels were approaching nearly end on, the tug already on the port bow of the Atlas. Every rule of navigation required them to pass to the right of each other, port to port, and their position and courses were such that, even without change by either,

they would have passed clear. If the tug could not have inclined further to her right, she could, at least, have refrained from a movement in direct defeat of the intention of the Atlas to conform to the rule and pass to the southward. Instead of doing either, and without stop-
176 ping, or even slowing, she turns across the course of the Atlas to the left, and by her signals apprises the Atlas she was doing so, thus arresting and thwarting the proper movement of the Atlas, and placing herself and her tow in the way of the latter. To the tug there was no proper confusion of signals. She herself needlessly created it by her two whistles, and yet did not even slow. The Atlas gave the proper signal and made the proper change, and on the instant the two whistles, improperly blown by the tug, apprised her of the faulty movement of the latter, she stopped and reversed, and did all it was possible to avoid collision. Had the tug ported, or even had she done nothing, the Atlas was passing to the right of her, and would have passed with en-
177 tire safety to both. In this state of the case the collision was clearly and chiefly owing to the mismanagement and fault of the tug.

If it were material, I should say that the large preponderance of the evidence is that the tug had not at the time proper lights. The proofs greatly impair confidence in the witnesses whose testimony tends to the contrary; and the uniform testimony of the other witnesses is that no lights on the Kate were visible, save perhaps one, very low, either near her deck—possibly there—or possibly at the rear end of her hawser, on the staff of one of her tows. But, however great this fault, and though clearly subjecting her to liability, if the want of sufficiently early sighting of the vessels by either had been the cause of the collision, the observations already made show that it was not caused so much
178 by the want of her lights as by her mismanagement, when each vessel had seen the other in full time for doing whatever it was proper each should do. Whether the Atlas would have seen her sooner if her lights were up and burning or not, the proof is conclusive that the lights of the Atlas were burning and bright; and the tug cannot claim at all that she had not the fullest opportunity and time for what she ought to have done. She can allege no hurry or unexpected approach of the Atlas, excusing the want of deliberation or judgment, or justifying her faulty mismanagement.

But, on the other hand, it was held, in the district court, that the Atlas also was in fault, and that such fault on her part contributed to the collision. That she was in fault cannot be denied. Indeed, the counsel for the claimants hardly insists that she was acting in compliance with the statute requiring a lookout. (Act of April 29th, 1864,
179 art. 20, 13 U. S. Stat. at Large, 61.) She is not chargeable on the ground that her conduct, after the tug was seen, was not in all respects judicious and proper, and such as would have avoided a collision if the tug had not improperly done what she did, but on the ground that she ought not to have come down through the Kills in the night, at the speed with which she was moving, without a lookout at the bow, vigilant in the performance of his duty. There is no evidence that her speed was itself an un'sual or improper speed for such a night, where vessels without any light could be seen at a very considerable distance. Indeed, the evidence does not show what her speed was at the time. It is only claimed to be presumptively fixed by a computation based on the time when she left New Brunswick and
180 the distance she had run at the *at the* time of the collision. The proof also establishes fully that her own proper lights were set,

and were burning and bright. She was, nevertheless, navigating the Kills without a proper lookout, in violation of the rules of navigation; and thereupon the question arises, did her fault in that respect contribute to the collision? Upon that question there is room for doubt and difference of opinion. The claimants, with great plausibility, insist, and I think the testimony shows, that her officers did see the tug in season to do what it was the duty of the Atlas to do in order to avoid her, and in season to do what would have avoided the tug if the latter had conformed to the rules of navigation by porting her helm, or even if she had done nothing. The claimants further insist that the Atlas did in fact what she ought to and would have done had she seen the tug
181 at a greater distance and however far off; that there was no danger of collision when the Atlas ported as the law required, and none, in fact, until the last moment, when the tug starboarded and threw herself in the way; that there was abundance of room to pass; that had the Atlas seen the tug at a distance of a mile or more, she would have approached, and might properly approach, as she did, near the middle of the Kills, and, when drawing near, would have ported to pass to the right, as the rule required; that this is just what she did do; that she would have signalled her intention to pass to the right by one whistle; that this also she did; that in either case she would have passed in safety by, had not the tug violated every rule governing her situation and thrown herself in the way; that at the very instant the intention of the tug to do this was signalled, the Atlas
182 slowed, stopped, and reversed, and made every possible effort to avert the consequences of the other's fault; that she could not have known that intention any earlier; that not one of the movements of the Atlas would have been earlier, nor ought it to have been earlier or different, if she had had the tug under observation for a mile or more; and that the measures to avert the consequences of the fault of the tug could not have been taken before that fault occurred.

There is much force in the argument of counsel for the claimants on this point. The liability of the Atlas to contribute is not to be tested by the inquiry whether she ought to have had a lookout as an abstract question. Her want of a lookout is not to operate to release the tug from the consequences of her own fault. Such want of a look-
183 out must be found to have contributed to the collision, or the fact is not material between these parties. Suppose, then, the Atlas had had a lookout, in the vigilant discharge of his duty, who had seen and reported the tug at a distanoe of a mile or more, and yet the Atlas had done just what she did do, and at the very time when in fact she did it: could it be said, upon the evidence, that she was in fault? This question is at least a doubtful one. (See The Pennsylvania, 4 Benedict, 257, and 9 Blatchf. C. C. R., 451.) If she did what it was right to do, and this was done when and as it ought to have been done, and her seeing the tug sooner would have made it more certain that, acting wisely and skillfully, she would do just what in fact she did, then in truth it would be difficult to say that her want
184 of a lookout contributed at all to the collision.

But this view of the responsibility of the Atlas proceeds upon somewhat dangerous ground. She was in fault. Although her speed in itself was not improper, moving at her ordinary and proper speed in the night, without a lookout, was improper. Such a lookout might certainly have discovered the tug earlier, and would have a better opportunity to discover what she was and which way she was going. The evidence is that, even without lights, a vessel could be seen that night

at a much greater distance than the tug was seen. When in fact the pilot saw and reported the tug to the captain, they were in doubt what the object in view was and what was its course. They did not see her at all until very near. Had a lookout been in the per-
185 formance of his duty, their information would have been earlier and presumptively more full. The act of Congress requiring a lookout assumes this as a general rule. There would have been more time for observation and deliberation, and I think that early measures by porting would have been taken, which would have tended to avoid the collision. This might even have prevented the faulty attempt of the tug to pass to the southward of the Atlas. The rule is a very important one, and it should be clear that its non-observance wrought no mischief before it should be excused. It is difficult to avoid the conclusion also that such early sighting of the tug would have subjected the Atlas to the rule requiring her to slow until it became clear that she could pass safely by. Early precaution is the most useful, and it
186 is safe to say that in such a channel it was peculiarly important that, by a vigilant lookout, the Atlas should be apprised at the earliest moment when this precaution was called for.

Upon the question raised by the appeal of the libellants, I am disposed to concur with the district court, and upon the grounds assigned in the opinion there delivered. (4 Benedict, 27.) It is an interesting and important question. I add to what was said in that opinion: The Kate and the Atlas, upon perfectly well-settled principles, were, for the reasons above given, bound to contribute to the loss. Had the libellants, instead of joining hands with the Kate to visit the consequences upon the Atlas alone, brought both into court to be dealt with upon those settled principles, each must pay one-half of the damages to which the libellants were entitled, (unless, possibly, in cases
187 supposable, both of the offending vessels were injured in such unequal degree that an unequal apportionment of the loss would give rise to a different equity.) The libellant came into this court with full knowledge of the rules governing courts of admiralty in cases of contributing fault. Those rules gave the Atlas rights of which the libellants could not deprive her by electing to proceed against her alone. Even if it be conceded that the libellants, if contribution by the Kate could not be enforced, might then have recourse to the Atlas therefor, which concession is said to be called for by the decree made in the case of the Washington and the D. S. Gregory, (9 Wall., 513,) where the point does not appear to have been made, and where all that can be fairly said of the decision is that the court thought no wrong was done to the libellant by the decree—if, I say, such concession
188 be made, it is still true that the libellants, by proceeding in this court, eminently a court of equity, could not deprive the Atlas of the protection which results from such a provisional decree; and it is just and equitable that they be held to an election to take the contribution to which, with all the parties concerned before the court, the Atlas would have been subjected. Upon the distinct authorities cited, and the reasons also given by the district judge, and also because it is in accordance with what is equitable and just, the decree in this court must proceed in affirmance of the decree appealed from, and award to the libellants the one-half of the damages reported. As both parties appealed, no costs of appeal should be allowed to either.

189 At a stated term of the circuit court of the United States for the eastern district of New York, in the second circuit, held at

the United States court rooms at the city of Brooklyn on the 29th day of October, 1873: Present, Hon. Lewis B. Woodruff, circuit judge.

THE PHŒNIX INSURANCE COMPANY, LIBELLANTS,
vs.
THE STEAMBOAT ATLAS, HER TACKLE, APPAREL, &c., The Camden and Amboy Railroad and Transportation Company, claimants.

A final decree having been entered in the above cause in the district court of the United States for the eastern district of New York on the 7th day of April, 1870, in favor of the libellants and against the
190 claimants for the sum of $7,090.71, and an appeal having been taken from said decree to this court by the libellants, and also by the claimants, and the cause having now been heard in its regular order on the calendar and argued by Thomas E. Stillman for the said Phœnix Insurance Company, libellants, and by Charles F. Sanford for the Camden and Amboy Railroad and Transportation Company, claimants; and due deliberation having been had, and it appearing upon the proof herein that the damages sustained by the libellants were occasioned by the mutual fault of the steam-tug Kate and the said steamboat Atlas, it is ordered, decreed, and adjudged that the said decree of the district court be, and the same is hereby, in all things affirmed, but without costs, and that the said Phœnix Insurance Company do recover against the said steam-tug Atlas and her said claimants, the Camden and
191 Amboy Railroad and Transportation Company, one-half of the damages by them sustained by reason of the collision in the pleadings mentioned, which sum, together with the costs accrued in the said district court, was, on the 7th day of April, 1870, seven thousand and ninety $\frac{71}{100}$ dollars, together with interest on said last-mentioned sum since said 7th day of April, 1870, amounting in the aggregate to the sum of eight thousand eight hundred and fifty-seven $\frac{67}{100}$ dollars, and that unless the last-mentioned sum be paid within the time allowed by law and the rules and practice of this court, or an appeal be taken with security so as to stay proceedings, that a summary judgment be entered therefor in this court against the said the Camden and Amboy Railroad
192 and Transportation Company, claimants, and that the said Phœnix Insurance Company have execution to collect the same according to law and the course and practice of this court.

L. B. WOODRUFF,
Circuit Judge.

(Endorsed:) U. S. circuit court, eastern district of New York, second circuit. The Phœnix Insurance Company vs. The Steamboat Atlas, her tackle, apparel, &c., the Camden & Amboy Railroad and Transportation Company. Decree. Filed and entered this 1st day of November, 1873.

193 *Petition of appeal.*

Supreme Court of the United States.

THE PHŒNIX INSURANCE COMPANY, APPELLANTS & LIBELLANTS,
vs.
THE CAMDEN AND AMBOY RAILROAD AND Transportation Company, claimants of the steamboat Atlas, her tackle, &c., appellees.

To the honorable the Supreme Court of the United States:

The petition and appeal of the above-named appellants showeth: That

on or about the 14th day of November, 1868, your petitioners filed their libel in the district court of the United States for the eastern district of New York against the said steamboat Atlas, her tackle, apparel, and furniture, and against all persons intervening for their interests
194 therein, in a cause of collision, civil and maritime, on which libel it is alleged and pray*ing* as therein contained; to which said libel your petitioners refer for its contents.

That thereafter the said Atlas having been seized by the marshal under process, was, on the 28th day of November, 1868, discharged from custody on claimants filing their claim and executing the necessary stipulations for costs and value.

That, thereafter, on the 16th day of December, 1868, the said claimants filed their answer to said libel, alleging as therein contained, and insisting that the said steamboat Atlas was not liable for the damages claimed by said libellants, and praying that the district court would pronounce against said libel and condemn the libellants in costs, as will more fully appear on reference to said answer.

195 And, thereafter, the said cause came on to be heard before the honorable Charles L. Benedict, on the 30th day of April, 1869, and the hearing thereof was continued upon subsequent days upon the allegations and proofs adduced by the respective parties, and after due deliberation thereupon the said judge, on or about the 28th day of February, 1870, made an interlocutory order or decree bearing that date, that the damages claimed by the libellants were caused by the mutual fault of the said steamboat Atlas and a certain steam-tug called the Kate, and that the libellants should recover against the said steamboat Atlas one-half of the damages by them sustained by reason of the collision in the pleadings mentioned, and that it be referred to one of the commissioners of the said district court to ascertain the amount of damages which the libellants were entitled to recover under the
196 terms of the said decree. That after proceeding with such reference before Samuel T. Jones, esqr., one of said commissioners, he made his report to said court bearing date the 4th day of April, 1870, on which he reported as the damages sustained by said libellants the sum of $13,617.07, and that in accordance with the terms of the said interlocutory decree the libellants were entitled to one-half of their said damages, being $6,808.51, to which said report your petitioners duly filed their exception; which exception coming on to be heard before the Hon. Charles L. Benedict, was overruled. And afterwards the costs and disbursements having been taxed at $282.20, a final decree was made bearing date the 7th day of April, 1870, whereby it was ordered, adjudged, and decreed, that the libellants recover against the said steamboat Atlas, her engines, etc., one-half
197 the damages by them sustained by reason of the collision in the pleadings mentioned, being the sum of $6,808.51, together with $282.20 taxed costs, making in all the sum of $7,090.71, and that said steamboat Atlas, her engines, etc., be condemned therefor, and that the stipulators for cost and value on the part of the claimants cause the agreements of their respective stipulations to be performed.

And these libellants being advised that said decree of said district court was erroneous, inasmuch as the said appellants libellants were entitled to and the said decree should have been against the said steamboat Atlas, her engines, &c., for the whole amount of damage sustained by your petitioners, the libellants and appellants, and not for one-half the amount of damages, and for the further reason that by the

said decree it was found that the damages sustained as aforesaid
198 by reason of the collision mentioned in the pleadings herein were not caused wholly by the said steamboat Atlas, but by the mutual fault of the said Atlas and a certain tug called Kate, appealed from said decree to the circuit court of the United States for the said eastern district of New York; and in their petition of appeal to said circuit court gave notice that on said appeal these appellants intended to seek a new decision on the pleadings and proof in the district court, and on other proofs to be introduced in said circuit court. And they prayed in their petition that said decree might be reversed, or that such other decree thereon might be made as to said circuit court should seem just.

That thereafter, the said cause came on to be tried and to be heard before the honorable Lewis B. Woodruff, sitting as circuit judge in the city of Brooklyn, in the said eastern district, on the 6th day of
199 November, 1872, in the term of said court, upon the allegations and proofs adduced by the respective parties which had been transmitted on the said appeal to said circuit court.

The said circuit judge having advised thereon made his decree bearing date the 29th day of October, 1873, and entered on or about the 1st day of November, 1873, with the clerk of said court, affirming the said decree of said district court, and adjudging and directing as therein contained, to which decree these appellants refer for its contents.

And these appellants are advised and insist that the said decree is erroneous, insomuch that the said decree of the said district court should have been reversed, and that the libellants and appellants should have been awarded by the said decree the total amount of their damages sustained by reason of the collision mentioned in the pleadings
200 herein, and not for the amount of one-half of their damages as awarded by said decree, and that it should have been found by the said decree that the said collision mentioned in the pleadings herein was occasioned by the sole fault of the steam-tug Atlas, and not by the mutual fault of the said steamboat Atlas and the tug called the Kate.

And these appellants, for these and other reasons, appeal from the whole and every part of said decree of said circuit court to the Supreme Court of the United States, and they pray that the said decree may be reversed as to those parts thereof which are herein complained of, and that such other decree may be made as to the said Supreme Court shall seem just, and that the claimants and appellees herein may be decreed to pay to these appellants their costs and damages in the premises.
201 And these appellants will ever pray.

Dated New York, March 31st, 1874.

BUTLER, STILLMAN & HUBBARD,
Proctors for Appellants.

THOS. E. STILLMAN,
Advocate.

(Endorsed:) Supreme Court of the United States. The Phenix Insurance Comp'y, appellants & libellants, vs. The Camden and Amboy Railroad, &c., Comp'y et al., claimants & appellees. Petition of appeal. Butler, Stillman & Hubbard, proctor' for appellant.

Due service of within petition of appeal is hereby admitted this 2nd day of April, 1874.

SANDFORD & WOODRUFF,
Attys. for Appellees.

Filed April 2nd, 1874.

202 *Bond for costs.*

Circuit court of the United States of America for the eastern district of New York, in the 2nd circuit.

THE PHENIX INSURANCE COMPANY, libllts. and appellants,
vs.
THE CAMDEN AND AMBOY RAILROAD AND Transportation Company, claimants of the steamboat Atlas, &c., appellees.

Know all men by these presents that we, the Phenix Insurance Company, Stephen Crowell, and Daniel F. Fernald, are held and firmly bound unto the above-named appellees in the sum of two hundred and fifty dollars, to be paid to the said appellees, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the 2nd day
203 of April, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas the above-named, the Phenix Insurance Company, have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the eastern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named appellants shall prosecute their said appeal to effect, and answer all costs if they fail to make their said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

PHENIX INSURANCE COMPANY, [L. S.]
By STEPHEN CROWELL, *President.*
STEPHEN CROWELL. [L. S.]
DANIEL F. FERNALD. [L. S.]

Sealed and delivered and taken and acknowledged this 2nd day of April, 1874, before me.

E. B. HUSTED,
Notary Public, Kings Co., New York.

204 UNITED STATES OF AMERICA,
Eastern District of New York, ss:

Stephen Crowell and Daniel F. Fernald, being duly sworn, depose and say, each for himself, that he resides in the city of Brooklyn, and that he is worth the sum of five hundred dollars over and above all his just debts & liabilities.

Sworn to this 2nd day of April, A. D. 1874, before me.

E. B. HUSTED,
Notary Public, Kings Co., New York.

(Endorsed:) U. S. circuit court. The Phenix Insurance Company vs. The Camden & Amboy Railr. & Trans'n Co. Bond for costs on appeal.
Approved.

CHAS. L. BENEDICT.

Filed this 2nd day of April, 1874.

205 By the honorable Charles L. Benedict, one of the judges of the circuit court of the United States of America for the eastern district of New York.

To the Camden and Amboy Railroad and Transportation Company:

Whereas the Phenix Insurance Company has lately appealed to the Supreme Court of the United States from the decree rendered in the circuit court of the United States for the eastern district of New York, on the 1st day of November, 1873, and has filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the 12th day of October, 1874, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Brooklyn, in the eastern district of New York, in the second circuit, the 3rd day of April, in the year of our Lord one thousand eight hundred and seventy-four.

CHAS. L. BENEDICT.

206 (Endorsed:) Supreme Court of the United States. The Phenix Insurance Company, appellants & libellants, vs. The Camden & Amboy Railroad, &c., Compy., et al., claimants & appellees. Citation. Butler, Stillman & Hubbard, proctors for appellant.

Service of within citation is hereby admitted this 3rd day of April, 1874.

S. & W.,
Attys. for C. & A. R. R. Co.

Filed April 3rd, 1874.

207 United States Supreme Court.

THE STEAMBOAT ATLAS, HER ENGINES, &C., The Camden and Amboy Railroad and Transportation Company, claimants and appellants,
vs.
THE PHŒNIX INSURANCE COMPANY, LIBELLANTS and appellees.

To the honorable the Supreme Court of the United States:

The appeal of the above-named appellants respectfully showeth that, on or about the 14th day of November, in the year eighteen hundred and sixty-eight, the above-named libellants and appellees, the Phœnix Insurance Company, exhibited its libel in the district court of the United States for the eastern district of New York, against the steamboat Atlas, her engines, boilers, tackle, apparel, and furniture, &c., in a cause civil and maritime, for the recovery of damages in amount exceeding
208 fifty dollars, alleged to have been sustained by said libellants, as insurers of the cargo of the canal-boat A. E. Hurd, from loss of said cargo by collision of said canal-boat A. E. Hurd with the said steamboat Atlas in the Kills between Staten Island, in the State of New York, and the State of New Jersey; and that said steamboat Atlas was arrested upon process issued upon said libel, and was discharged on these appellants filing their claim and entering into stipulations; and

these appellants thereupon, on or about the sixteenth day of December, in the year eighteen hundred and sixty-eight, filed their answer to said libel in the said district court, praying that said district court would pronounce against said libel, and condemn said libellants in costs and expenses, as by reference to said libel and answer may more fully appear.

That the said cause came on to be heard before the honorable
209 Charles L. Benedict, judge of the said district, on or about the 30th day of April, and the 30th day of May, in the year eighteen hundred and sixty-nine, upon the deposition and proofs taken in said cause, and the testimony and proofs adduced by the respective parties. And the said judge having advised therein, on the 28th day of February, in the year eighteen hundred and seventy, made a decree in said case whereby it was ordered, adjudged, and decreed that the libellants above named do recover against the said steamboat Atlas, &c., one-half of the damages by them sustained by reason of collision in the pleadings mentioned; and that said steamboat Atlas, her engines, machinery, &c., be condemned therefor; that said decree further ordered that it be referred to one of the commissioners of said district court to ascertain the amount of the damages which said libellants were entitled to recover
210 under the terms of said decree, as by reference to said decree will more fully appear; that under said decree a reference was had to Samuel T. Jones, a commissioner of said district court, who reported that the amount of damages to which said libellants were entitled, in accordance with the terms of the above interlocutory decree herein, was the sum of six thousand eight hundred and eight $\frac{50}{100}$ dollars. And thereupon said libellants filed exceptions to said report, which exceptions were overruled, and that said report was confirmed by said district court. And that, thereupon, on the seventh day of April, eighteen hundred and seventy, a final decree was made and pronounced in said cause by the said district court, wherein it was in substance ordered, adjudged, and decreed that the said libellants do recover against
211 the said steamboat Atlas, her engines, &c., one-half of the damages by them sustained, by reason of the collision in the pleadings mentioned, being the sum of six thousand eight hundred and eight dollars and fifty-one cents, together with costs. And these appellants being advised and insisting that said decree was erroneous, and should be reversed, inasmuch as said claimants, these appellants, were not liable for the damages by said libellants claimed to have been sustained, nor for any part thereof, and that the decree should have been rendered in favor of said steamboat, and against said libellants, dismissing said libel with costs, therefore and thereupon appeal from the whole of the said decree in favor of said libellants, the Phœnix Insurance Company, to the next circuit court to be held in said district, and gave notice
212 that on said appeal they intended to have said cause heard anew in the circuit court, on the pleadings and proofs in the district court, and other proofs to be introduced in the said circuit court.

That the said appeal to said circuit court came on to be heard before the honorable Lewis B. Woodruff, judge of the said circuit of the United States for the said eastern district of New York, on the eighth day of November, in the year eighteen hundred and seventy-two, upon the pleadings and proofs taken in district court. And the said judge of the said circuit court having advised therein, on the twenty-ninth day of October, in the year eighteen hundred and seventy-three, made a decree in said cause, whereby it was ordered, adjudged, and decreed that the said decree of the said district court be, and the same thereby

213 was, in all things affirmed, but without costs, and that the said Phœnix Insurance Company do recover against the said steam-tug Atlas, and her said claimants, The Camden and Amboy Railroad and Transportation Company, one-half the damages by them sustained by reason of the collision in the pleadings mentioned, which sum, together with the costs accrued in the said district court, was, on the seventh day of April, eighteen hundred and seventy, seven thousand and ninety $\frac{71}{100}$ dollars, together with interest on said last-mentioned sum since said seventh day of April, in the year eighteen hundred and seventy, amounting in the aggregate to the sum of eight thousand eight hundred and fifty-seven $\frac{67}{100}$ dollars; and that unless the last-mentioned sum be paid within the time allowed by law, and the rules and practice of said
214 circuit court, or an appeal be taken with security so as to stay proceedings, a summary judgment be entered therefor in said circuit court, against the said The Camden and Amboy Railroad and Transportation Company, claimants, and that the said Phœnix Insurance Company have execution to collect the same according to law and the course and practice of said circuit court, which decree was filed and entered on the first day of November, 1873. And these appellants are advised and insist that the said decree of said circuit court is erroneous and should be reversed, inasmuch as said claimants, these appellants, are not liable for the damages by said libellants claimed to have been sustained, nor for any part thereof, and the decree should have been rendered in favor of these appellants and against the libellants, respondents
215 herein, reversing the decree of said district court, and dismissing said libel with costs.

Wherefore these appellants appeal from the whole of the said decree of the said circuit court, in favor of the said libellants, The Phœnix Insurance Company, to the Supreme Court of the United States, and respectfully pray that the decree of the said circuit court, and the libel, answer, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause, and that the said decree of the circuit court, and every part thereof, may be reversed, and a decree made dismissing said libel with costs, or that such other decree may be made as to the said Supreme Court may seem just.

216 Dated New York, November 11th, 1873.

The Camden & Amboy Railroad an' Tra'sportation Company,
By SANFORD & WOODRUFF,
Their Proctors.

SANFORD & WOODRUFF,
Proctors for Claimants and Appellants.
CHAS. H. WOODRUFF, *Advocate.*

Service of a copy of the within appeal is this day admitted.
N. Y., November 11th, 1873.

BARNEY, BUTLER & PARSONS,
THOS. E. STILLMAN,
Proct. for Libellant'.

(Endorsed:) Supreme Court of the United States. The Steamboat Atlas, her engines, &c., the Camden & Amboy Railroad and Transportation Company, claimants & appellants, vs. The Phœnix Insurance Company, libellants & appellees. Appeal from U. S. circuit to U. S. Supreme Court. Sanford & Woodruff, proctors for claimants & appellants.

Due service admitted this 11th day of November, 1873.

THOS. E. STILLMAN,
Proctor for Libellants.

Filed November 12th, 1873.

217 *Bond.*

Circuit court of the United States of America for the eastern district of New York, in the second circuit.

THE STEAMBOAT ATLAS, HER ENGINES, &C., The Camden and Amboy Railroad and Transportation Company, claimants & appellants,
vs.
THE PHŒNIX INSURANCE COMPANY, LIBELLANTS and appellees.

Know all men by these presents that we, The Camden and Amboy Railroad and Transportation Company, David Salomon, of the city of New York, and John McDonald, of Stapleton, in the county of Richmond and State of New York, are held and firmly bound unto the above-named The Phœnix Insurance Company in the sum of twenty thousand dollars, to be paid to the said The Phœnix Insurance Company, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our
218 seals and dated the seventh day of April, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas the above-named appellants have prosecuted an appeal to the Supreme Court of the United States, at the city of Washington, in the *the* District of Columbia, to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the eastern district of New York, second circuit:

Now, therefore, the condition of this obligation is such, that if the above-named appellants shall prosecute their appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE CAMDEN & AMBOY R. R. & TRANS. CO.,
By A. DENNIS, *Agent.* [L. S.]
D. SALOMON. [L. S.]
JOHN McDONALD. [L. S.]

Sealed & delivered, & taken & acknowledged, this 8th day of April, 1874, before me, as to the Camden & Amboy Railroad & Transportation Company, and this 9th day of April as to Salomon, and this 10th day of April as to McDonald.

EDWARD L. OWEN,
U. S. Commissioner for the Southern Dist. of N. Y.

219 UNITED STATES OF AMERICA,
Southern District of New York, ss:

David Salomon and John McDonald, being duly sworn, depose and say, and each for himself saith, that he is a freeholder within the State of New York, and that he is worth the sum of twenty thousand dollars, over and above his just debts and liabilities.

D. SALOMON.
JOHN McDONALD.

Sworn to this 9th day of April, A. D. 1874, before me, by Salomon, and this 10th day of April by John McDonald.

EDWARD L. OWEN,
U. S. Commissioner for the Southern Dist. of New York.

(Endorsed:) U. S. circuit court. The Steamboat Atlas, her Engines, &c., The Camden and Amboy Railroad and Transportation Company, claimants & appellants, vs. The Phœnix Insurance Company, libellants & appellees. Bond for damages and costs on appeal to the U. S. Supreme Court. Sanford & Woodruff, appellants' proctor. Filed this 14th day of April, 1874.

220 By the honorable Lewis B. Woodruff, judge of the circuit court of the United States for the eastern district of New York, in the second circuit.

To the Phœnix Insurance Company:

Whereas the Camden and Amboy Railroad and Transportation Company, claimants of the steamboat Atlas, her engines, &c., have lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the eastern district of New York, in the second circuit, made in favor of you, the said Phenix Insurance Company, against the said steamboat Atlas, her engines, &c., and have filed the security required by law: You are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October, 1874, to do and receive what may appertain to justice to be done in the premises.

221 Given under my hand at the city of New York, in the second circuit, the thirteenth day of April, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-eighth.

L. B. WOODRUFF,
Circuit J.

(Endorsed:) U. S. circuit court, second circuit, eastern dist. of New York. The Phœnix Insurance Company vs. The Steamboat Atlas, her Engines, &c., The Camden and Amboy R. R. and Transportation Company. Citation. Sanford & Woodruff, proctors for claimants & appellees.

Due service of a copy of the within citation is hereby admitted, April 14th, 1874.

BUTLER, STILLMAN & HUBBARD,
For Appellees.

Filed April 14th, 1874.

222 UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, Samuel T. Jones, clerk of the circuit court of the United States of America for the eastern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one (1) to 222 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The Phœnix Insurance Company, libellants and appellants, vs. The Steamboat Atlas, her Engines, &c., The Camden & Amboy Transportation Company, claimants & appellants, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of Brooklyn, in the eastern district of New York, in the second circuit, this 18th day of June, A. D. 1874, and of the Independence of the said United States the ninety-eighth.

[SEAL.] SAMUEL T. JONES, *Clerk*,
By E. B. HUSTED, *Deputy*.

(Indorsement on cover:) No. 242. The Steamboat Atlas, her Engines, &c., The Camden & Amboy Railroad & Transportation Company, claimants, appellants, vs. The Phœnix Insurance Company. E. New York C. C. U. S. Filed 11th September, 1874.

EVENING POST STEAM PRESSES, 208 Broadway, cor. Fulton St., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1876, No. 47.

THE STEAMBOAT "ATLAS," HER engines, &c., The Camden & Amboy Railroad & Transportation Company, Claimants, Appellants,

vs.

THE PHENIX INSURANCE COMPANY, Libellants and Appellees.

THE PHENIX INSURANCE COMPANY, Libellants and Appellants,

vs.

THE STEAMBOAT "ATLAS," HER engines, &c., The Camden & Amboy Railroad & Transportation Company, Claimants and Appellees.

Appeals from the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR THE PHENIX INSURANCE CO.

Statement of the Case.

This cause comes up upon cross-appeals from a decree of the Circuit Court of the United States, for the Southern District of New York, rendered October 29th,

1873, affirming a decree of the District Court of the United States for the Eastern District of New York, rendered April 7th, 1870, in favor of the libellants, the Phenix Insurance Company, against the claimants, for the sum of $7,090.71, being one equal half part of the damages sustained by the libellants by reason of the collision which constituted the libellants' cause of action.

See Decrees of U. S. District and Circuit Courts, Record, fols. 150, 151, 190, 191

The LIBEL of the Phenix Insurance Company, filed November 14th, 1868, against the steam-tug *Atlas*, her engines, &., alleged that by the fault and negligence of those on board of and navigating the *Atlas* on the morning of March 18th, 1868, in the kills of New Jersey, she came into collision with the steam-tug *Kate*, bound from New York to New Brunswick, N. J., through the kills, with a schooner and two canal boats in tow, one of which boats, the *A. E. Hurd*, had on board a cargo of linseed, insured against the perils of navigation by said libellants. That by the collision, the facts and circumstances of which are fully set forth, the boat *A. E. Hurd*, with her cargo, was sunk in about twelve feet of water, and the cargo was totally lost and abandoned to the libellants as insurers, who paid a total loss, which they claim to recover from the said steam-tug *Atlas*, in the sum of $11,965.

Libel Rec., fols. 2–7.

The ANSWER of the Camden & Amboy Railroad & Transportation Company, claimants of the steam-tug *Atlas* (filed December 16th, 1868), denied that the collision was caused by any fault or mismanagement on the part of the *Atlas*, and alleged that it was solely due to the fault, negligence, and mismanagement of those in charge of and navigating the steam-tug *Kate*.

Answer, Rec. fols. 22–27.

At the hearing, before the District Judge of the Eastern District of New York, (April 30th, 1869), it appeared by the evidence that the steam-tug *Kate*, a small vessel only about 50 feet long and 14 feet wide, left New York about 6 P. M. on the 17th March, 1868, bound on a voyage to New Brunswick, N. J. She had in tow a schooner, a light boat, the *Tracey*, and a lake boat or barge, the *A. E. Hurd* (*Reed*, *fol.* 35, *lb.*, *fol*, 43). She reached New Brighton, Staten Island, about 10 o'clock P. M., and there made fast to the dock, and remained on account of head tides, until about a quarter past 3 o'clock the next morning (*Reed*, *fols.* 35, 36, 32). Then, before leaving New Brighton, the boats in the tow were rearranged as to their position (*Reed*, *fol.* 39). They were towed astern, and abreast of each other, forming a single tier, the light boat, the *James Tracey*, on the port side of the tier, the schooner in the middle, and the *A. E. Hurd*, on the starboard side. They were towed by two hawsers, one from the stern of the *Kate* to the bows of the two outside boats respectively, and fastened or "bridled" by lines to the schooner. The hawsers were thirty-seven fathoms long, and there were thirty fathoms out clear of the stern. The tow was made up strongly and well secured, and so remained up to the collision. (*Reed*, *fols.* 35, 36, 39; *Couley*, *fols.* 29, 30.

The *Kate* had a pilot, who was her captain, an engineer, a fireman, and a deck hand. At the time of the collision the pilot was at the wheel, the fireman in the engine room, and the deck hand on deck alongside the pilot house. The engineer was in the forward cabin. The *Kate* had her green and red lights in their proper places, a white light at the mast head on the flag staff over the stern, 25 feet high, all burning brightly (*Reed*, *fols.* 41, 42, 36; *Sterrill*, *fol.* 56; *Jas. H. Reed*, *fols.* 58, 59, 61).

After leaving New Brighton the *Kate* took a northwesterly course for Port Johnson on the Jersey shore. The tide was flood, carrying the tow up towards Staten

Island shore. The night had been dark and stormy, but it was clearing up so that both shores could be seen. There were vessels at anchor whose lights were visible (*Conley, fols.* 30, 31, 32; *Reed, fols.* 36, 39; *Durham, fol.* 67.) About ten or fifteen minutes after leaving the dock (*Taylor, fol.* 48), when the *Kate* was about 150 or 175 yards from the Jersey shore, about two-thirds of the way from the Staten Island shore, going about 2½ knots an hour, the tow hanging a little off to the port hand, as the tide set over towards Staten Island, the pilot of the *Kate* heard one whistle off his starboard-bow, and saw a light, at a distance of about one-eighth of a mile. The one whistle was a signal from the approaching vessel, which proved to be the *Atlas*, that it would pass on the right hand on the port side. The pilot of the *Kate*, fearing that he could not get across the bow of the *Atlas*, instantly blew two whistles as a signal to the *Atlas* to pass to the left on the starboard side, and immediately afterwards starboarded his helm, and signalled to the engine room to stop and back, which was done at once; the engine was reversed and about seventy backward revolutions made when the collision occurred (*Reed, fols.* 37, 41, 43, 46; *Taylor, fols.* 49, 50; *Jas. H. Reed, fol.* 59).

The *Atlas* was a large side wheel steam tug, 250 feet long and 30 feet wide (*Durham, fol.* 67; *Parrisen, fol.* 101). She was bound at the time of the collision from South Amboy to New York, with a single barge, the *Julia*, on her larboard side; her course was through the middle of the Kills, about east by south half south. She had left South Amboy at half past one o'clock, and had run the distance from there to the point of the collision, 21 miles, in about 2 hours—a rate of ten miles an hour (*Durham, fols.* 74, 75). Her rate of speed had not been changed (*Ib.*) She had on board eleven men all told including the captain; three were in the pilot house—Durham, the captain; Parrisen his father-in-law, a pilot, and McKenna, a deck hand, Pancost, the assistant enginer, was in the engine room;

Walker, the engineer, was on the upper deck; Culver, a watchman, was on deck astern; all the others were below (*Durham, fol.* 74 and *sec. fols.* 92, 102, 119). *The Atlas had no look-out.* This was conceded (*Opinion, Rec. fol.* 179).

The pilot of the *Atlas* saw a light ahead and called the attention of the captain to it. He took it for a vessel going out in the same direction with the *Atlas*, and said so to the pilot (*Parrisen, fols.* 75, 76; *Durham, fols.* 66, 76; *McKenna, fols.* 93, 98). While still under that mistake, the pilot of the *Atlas* ported his helm and then blew one whistle. The tow was then plainly in sight (*Durham, fol.* 71; *Parrisen, fol.* 84). Two whistles were blown by the *Kate*, and the captain and pilot then first discovered that it was an approaching vessel; the *Atlas* was then within two lengths of the *Kate*, and the captain "rang four bells to stop and back, and the jingle bell to back her strong," and starboarded his helm, and in about a minute the collision occurred (*Durham, fols.* 67, 68; *Parrisen, fol.* 84).

The witnesses on the *Atlas* testified that they saw the white light of the schooner and no side lights on the *Kate* (*Durham, fol.* 67; *Parrisen, fols.* 83, 86; *McKenna, fol.* 92; *Schenk, fol.* 107), and also that the *Kate* was on the port bow of the *Atlas* (*Ib.. fols.* 66, 83, 92). None of them heard the puffing of the *Kate*, though she was a high-pressure boat (*Ib., fols.* 77, 78, 90, 111).

When the two tugs collided, the *Kate*, under her starboard helm, had swung to port and headed about southeast (*Conley, fol.* 30; *Durham's letter, fol.* 132). The *Atlas* struck her on the starboard side, amidships, abreast the engine room, head on, shoving her down on the tow, and the barge *Julia*, in tow of the *Atlas*, struck the *Hurd*. The *Kate* sunk in about five or ten minutes. The *Hurd* sunk before they could get her hatches off. The men saved themselves by getting on the schooner (*Conley, fols.* 30, 31; *Reed, fol.* 37).

The *Atlas* was hailed bythe *Kate* and asked to shove

her ashore, but made no response and proceeded on her way; "as soon as she could back off and go on, she did so" (*Reed, fol.* 38; *Conley, fol.* 31. *Taylor, fol.* 51; *Sterrett, fol.* 56; *Jas. H. Reed, fol.* 60).

The testimony as to the lights and as to the bearings of the respective vessels from each other was conflicting, and there were some attempts to discredit the witnesses on either side by proof of contradictory statements or declarations made by them, and of ill feeling, &c.

The District Judge, before whom all the witnesses, with a single exception, were examined orally, held the *Atlas* in fault for running through a thoroughfare in the night without any lookout; and he also criticised her conduct in not remaining by the disabled vessels, but leaving them to shift for themselves, as enhancing or confirming the main fault imputed to her. He also held the *Kate* in fault for want of a proper lookout.

See Opinion of Benedict, J., fols. 135, 137.

The learned District Judge further held that, although the owners of the cargo on the *Hurd*, to whose rights the libellants are subrogated, were in nowise chargeable with the neglect imputed to the *Kate*, and were innocent parties, yet, under the rule of the Admiralty Law, apportioning the damages in cases of mutual fault, they could only recover one-half of the actual loss sustained by them by reason of the mutual fault of the *Atlas* and the *Kate*.

See Opinion, fol. 128, *et seq.*

In conformity with this opinion a decree was entered in favor of the libellants for one-half of the total damages sustained by them as proved before the U. S. Commissioner under an order of reference, in due course, such total damages being $13,617.02, and the one-half thereof being $6,808.51, besides costs. The

libellants duly excepted to the report for only one-half the damages. The exceptions were overruled.

See Order of Reference, fol. 146.
Commissioner's Report, fol. 147.
Exceptions, fol. 150.
Decree, April 7, 1870, *fols.* 150, 151.

Cross appeals to the U. S. Circuit Court from the decree of the District Court were taken by the libellants and claimants respectively. No new evidence was taken in the Circuit Court. The decree of the District Court was affirmed, without costs to either party.

Petitions of Appeal, fols. 153, 160.
Opinion of Woodruff, Circuit Judge, fol. 168.
Decree of Affirmance, filed November 1, 1873, *fol.* 90.

From this decree both parties appealed to the Supreme Court of the United States.

Petitions of Appeal, fols. 193, 207.

Assignment of Errors.

The Phenix Insurance Company, appellants, assigns as error in the decree of the U. S. Circuit Court, entered November 1, 1870, the following:

First.—That the decree, instead of awarding and adjudging the whole amount of the damages actually sustained by the libellants, as found and reported by the U. S. Commissioner, by his report, dated April 4, 1870, *viz.*, $13,621.02, and interest from the date of said report, awards and adjudges to libellants only one-half of said sum.

Second.—That in and by the said decree it is adjudged and decreed that the damages sustained by libellants by reason of the collision mentioned in the pleadings in this cause were caused by the mutual fault of the steamboats *Atlas* and *Kate*, and not by the sole fault of the steamboat *Atlas*.

POINTS.

First Point.—The court below erred in limiting the recovery of libellants to one-half the value of the cargo destroyed by the collision. Under the circumstances of this case the libellants were entitled to recover the whole amount of their loss from either of the two vessels which were adjudged to be mutually in fault in causing the loss.

1st. The owners of the cargo of the canal boat *A. E. Hurd*, in tow of the steam tug *Kate*, were innocent parties and in no way responsible for the collision. They had no control over the movements of either of the steam tugs, nor were the master or crew of either of those vessels their agents or servants. The cargo stood in the same relation to the two steam tugs, by whose concurring negligence it was destroyed, as a passenger lawfully on the canal boat or on either of the steam tugs at the time of the disaster would have occupied, had he, without fault of his own, sustained personal injuries by the collision.

The Milan, 1 Lush., 388 *p.* 403.
The Alabama and Game Cock, decided in in this court, October Term, 1875. *Nos.* 201, 202.

2d. At common law the owners of the cargo could upon the facts of this case, have proceeded against the owners of either of the offending vessels, and have recovered the whole amount of their damages from such owners. No rule is better established than that which gives to an innocent party, injured by the co-operative negligence of several persons, the right to sue them jointly or severally, and to recover compensation from either for the injury done by all.

Guille v. *Swan*, 19 Johns., 381.
Chapman v. *New Haven R. R. Co.*, 19 N. Y., 341.

In the case last cited the plaintiff was a passenger in a train of the Harlem Railroad Company, and was injured by its collision with a train of the defendants, resulting from negligence in the management of both trains. A verdict in favor of plaintiff was sustained on the ground that the contributory negligence of the persons in charge of the train in which he was a passenger was no defense, and that he was entitled to recover his damages from either of the companies.

Webster v. *Hudson River R. R. Co.*, 38 N. Y., 260.

Arctic Ins. Co. v. *Austin*, 10 N. Y. Sup, Ct. R. (2 Hun.), 195.

Colegrove v. *N. Y. & N. H. R. R. Co. & Harlem R. R. Co.*, 20 N. Y., 292.

In the last cited case the plaintiff, who was a passenger on a train of the Harlem Railroad Co., injured by a collision resulting from the negligent management of such train, and of a train of the N.Y. & New Haven R. R. Co., was held entitled to maintain an action against both companies for their joint negligence.

(*See the report of the case in* 6 *Duer*, 382.)

3d. This rule of the common law, creating a joint and several liability in cases of this description does not rest on the principle that the injury is the result of a joint act implying a common design or intent to produce the injury. The ground of the liability is, that by a single and forcible act which would not have happened except by the concurring negligence of two parties, a single injury has been sustained by an innocent party. For such an act trespass lies against the parties concerned either jointly or severally, at the option of the injured party, for all the damages inflicted.

The learned District Judge was, therefore, clearly in error in stating that upon the facts of this case an action against the owners of the two colliding vessels, founded upon an allegation of joint negligence, could not be maintained at common law; and he was equally mistaken in assigning as the reason why, at common law, in an action against either vessel the whole amount would be adjudged, the impossibility of determining the proportion of loss imputable to each offender (*see Opinion Rec. fol.* 139). The common law holds that for a single trespass or act of negligence, a direct liability attaches, jointly and severally, to all and each of the trespassers or wrongdoers. It does not concern itself while giving redress to the injured party for the wrong done to him, with any question of adjustment as between the wrongdoers as to their relative responsibility.

4th. The rule, that in the case of a single injury to an innocent third party by the concurring negligence of two or more other parties, he may recover full compensation from either, and may, at his election, pursue his remedy against all on the ground of their joint liability, or against any one on the ground of his several liability, must obtain in the courts of admiralty. This is matter of right in respect to which the rule of the admiralty apportioning damages equally as between the parties mutually in fault, does not apply.

5th. The admiralty rule of apportionment is a rule of limitation and distribution of damage among and between wrongdoers, *as respects themselves.* It is not a rule of justice and hardly a rule of equity, because it imposes an equal contribution on the ships in fault, without regard to their relative value or the degree of blame imputable to either vessel. It is properly styled by Chan-

cellor Kent, following Cleirac, a *rusticum judicium*, by which an arbitrary rule, is applied as the best method of disposing of cases in which the precise measure of fault is either inscrutable or not ascertainable with accuracy (3 *Kent's Com.*, p. 313, 11th ed).

In the leading case of *Hay* v. *LeNeve*, in the House of Lords, in which, in 1874, the rule was permanently engrafted into the English admiralty law, the decree appealed from had apportioned the loss unequally. On the basis of a report by Rear Admiral Beresford, the Scotch Court of Session had charged two-thirds of the damages on the vessel most in fault, and one-third on the other and less guilty vessel. But this attempt at discrimination was disapproved by the House of Lords, and the continental rule of arbitrary and equal division was adhered to.

See Hay v. *LeNeve*, 2 Shaw's Scotch Appeals, 395.

6th. The arbitrary rule of apportionment, in admiralty, between two wrongdoers has no proper application to the case of an innocent sufferer by their mutual fault. Absolute justice may well require that, as between the wrongdoers themselves, the precise measure of responsibility or penalty should be meted out to each according to his several deserts, and the inability of human tribunals to administer absolute justice, may excuse a resort to the rude and peremptory method of an equal division. But the innocent third party is not concerned in this division. Justice requires that *his* wrong should be redressed without reference to an adjustment of the relative degrees of blame or responsibility as between those who have committed the wrong, or to their ultimate liability to contribution between themselves. No possible reason can be urged in a court of admiralty for requiring the

to him which applies to the owners of the ships.

The libellants had elected to sue both the *Alabama*

right of the innocent and passive victim of the mutual fault of two wrongdoers to be entangled, against his will, with the adjustments of their relative degrees of responsibility, than could be urged in a court of law. Both courts recognize the right of the innocent party to be compensated for his loss; and as this right to compensation springs from the fact of the injury done to him, and does not depend upon the mutual relations or rights of those who did the wrong, no rule of apportionment as between them can affect his right. The reason of the rule failing, the rule fails.

7th.—The *Milan* (1 Lush., 388) is the only reported case in which it has been attempted to impose the admiralty rule of equal apportionment, as between wrong doers, upon an innocent party, by limiting his recovery in a suit against one of two offending vessels to a moiety of the damage done by both. In that case the cargo was on one of the two vessels in fault, and the main ground on which the application of the admiralty rule of equal division was urged was that the owner of the cargo, though innocent, was so identified with the vessel that he could not recover, even at common law, and the respondent's counsel relied on the case of *Thoroughgood v. Bryan*, 8 Com., B., 115, in support of this proposition (*see the argument of respondent's counsel*, 1 Lush., *pp.* 395, 396). But this case is not authority in England, as conceded by Dr. Lushington (*Id.*, p. 403) and in this country it has been expressly held to be wholly inapplicable in cases like the present one (*see Chapman* v. *N. Haven R. R. Co.*, 20 N. Y., 341, and *Webster* v. *Hudson River* R. R. Co., 38 N. Y., 260, *opinion of* HUNT, *Ch. J.*) Dr. Lushington further conceded in his opinion that there was no reported case in admiralty when the rule of apportionment had been applied, as to owners of cargo who were not owners of the ship

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involved in the collision; and he adds: "It is true, as I think, that the owner of the cargo is to be considered a perfectly innocent person, and that he does not stand in the same position as the owner of one of two delinquent ships, and if the ground upon which the admiralty rule rests is the joint culpability of the plaintiff and defendant, it might well be that the owner of cargo would recover his whole damage against the adverse ship." He then says that "this is not exactly the admiralty rule," and in a hesitating, if not inconclusive way, he decrees in favor of the owner of the cargo for only a moiety of his loss, on the sole ground that this disposition of the case is most conformable to the admiralty rule. (*Opinion*, 1 Lush., p. 404).

8th. In this court the *Milan* has been disapproved. The rule of liability has been held in the recent case of the *Alabama* and *Gamecock* cited above (*Oct. Term*, 1875) to rest upon the joint culpability of the two offending vessels, so that if either is of insufficient value to respond for its moiety of the whole amount of damage, (its proper share as between itself and the other vessel in fault), the other is held liable for the residue, so as to give full compensation to the innocent party injured by the concurring fault or negligence of both vessels. In the case of the *Alabama* and *Gamecock*, as in the one at bar, the Circuit Court followed the supposed views of Dr. Lushington in the case of the *Milan* (*see opinion of Mr. Justice* BRADLEY) and divided the loss of the innocent owner of cargo equally between the two offending vessels; this court reversed the decree, and held that it was just that the innocent owner of the cargo "should recover the damage done from those who caused it," and that "*the reason for a division of the damage does not apply to him which applies to the owners of the ships.*" The libellants had elected to sue both the *Alabama*

and the *Gamecock*, both being in fault, but their relative values were greatly disproportioned, the *Alabama* being bonded for $100,000 and the *Gamecock* for $10,000; the libellants' loss was adjudged to be $8,000, and the court rejected the rule of admiralty apportionment by justly decreeing that the *Alabama* should bear and pay any balance of the moiety of the damage decreed against the *Gamecock*, which could not be collected from the last named vessel or her stipulators. (*See Opinion.*) A like rule was applied in the earlier case of the *D. S. Gregory*, 9 Wall., 513.

9th. The decisions just cited are wholly inconsistent with and fatal to the view taken by the learned district judge, that the admiralty favors a limitation of the liability of vessels in fault for collision, not only as respects themselves, but also as respects the innocent owner of cargo. (*See opinion of* BENEDICT, J., *Rec., fols.* 141, 142.) They also overrule the case of the *Milan*.

It may be remarked in reference to the opinion of the learned Circuit Judge, concurring with the District Judge in sustaining the rule as applied by Dr. Lushington (*see opinion of* WOODRUFF, J., *Rec., fol.* 186), that this disposition of the case was in conformity with his dissenting opinion in the case of *Colgrove* v. *Harlem, & N. H. R. R. Co.*, in the Superior Court (*see* 6 Duer, 382, *p.* 419), where, in opposition to the views of a majority of the court (which prevailed on the appeal), he contended against applying the rule of joint liability in cases of injury resulting from the negligence of two parties not acting together by design.

10th. The right of the innocent third party, in admiralty as well as at common law, to recover his whole damages from either of two wrong doers, is fully supported by the case of *The New Philadelphia*, 1 *Blk.*, 62, in which the court say that "where

a third party has sustained an injury to his property, from the co-operating consequence of two causes, though the persons producing them may not be in intentional concert to occasion such a result, the injured person is entitled to compensation for his loss, from either one or both of them, according to the circumstances of the accident" (*The New Philadelphia*, 1 *Blk.*, 62). *Opinion, p.* 76.

11th.—In the present cases the libellants were the owners of cargo in a boat towed by the *Kate*, one of the two vessels adjudged to be in fault—a position more remote and passive as respects the incident of the collision, than that occupied by the libellants in any of the cases above cited. It appears in evidence that the *Kate* was sunk by the collision. The libellants certainly had the right to proceed at once against the remaining vessel, the *Atlas*, for the whole value of the cargo; and this right is wholly unaffected by the circumstance that they might have joined the owners of the *Kate*, and that had they done so, the Admiralty Court, having all the parties before it, would have decreed, as between the two parties adjudged in fault, the amount of their respective and relative liability for the whole damage. This apportionment, however, as seen in the case of the *Alabama* and *Gamecock*, would not necessarily have been equal according to the Admiralty rule, but would have been so decreed as to give full compensation to the libellants. Hence the admiralty rule of equal apportionment has no bearing on the question of who shall be brought into court as parties defendant, because it is not applied to the parties after they are brought in. If the libellant elects to join all the parties in fault as defendants, the Court will exercise its powers over them as between themselves; but if he does not so elect, and each of them is severally liable, there is no reason a

rule which requires the libellant to bring all the parties into court for the purpose of adjusting a contribution between them for the injury for which each is severally liable to him.

(*a.*) The learned District Judge erred in the effect which he gave to the very common practice in proceeding in admiralty against both colliding vessels, and in assuming that, because the Court has power in such a case to apportion the damages, it will not award full compensation to the libellant against either vessel in a direct proceeding to enforce its several liability. The question we submit does not turn upon the power of the Court to distribute the loss, when both vessels are in court, but on the right of the libellant to enforce the several liability of each vessel without bringing both into court.

(*b.*) That the liability is severed in a case like the present, where the cargo was owned independently of the vessels, and was not carried on either of them, cannot be questioned. And as the admiralty rule of equal distribution does not enter into the case, there is no more reason in admiralty than at common law why the libellant should be required to bring all the wrong doers into court as a prerequisite to obtaining full compensation for his loss.

12th.—If the right to enforce the several liability of each of the vessels in fault is denied, great injustice, hardship and inconvenience may result to innocent parties. In order to obtain full compensation, they must sue all the offending vessels, and in the case of tug boats with flotillas of vessels in tow, these may be numerous. It also compels him to take the risk of proving all the vessels said to have been in fault, or of paying heavy costs to those who are finally decreed to

be blameless. Moreover, by joining all the vessels, the innocent party, incurs the hazard arising from a combination between both, to defeat his recovery and of a long litigation between the vessels themselves as to their respective guilt or innocence with. In the present case the libellants were not present by themselves, or their servants, at the collision ; they knew the facts only from hearsay. If the facts, as reported to them, showed that the *Atlas* was alone in fault, on what conceivable ground were they compelled to charge the *Kate* with being also in fault as a condition precedent to their right to compensation? If such a rule is made a part of the admiralty law, it is manifest that an innocent party has thrown upon him, not only the loss which he has sustained, but also, if he seeks redress, the burden of setting on foot and prosecuting a suit for the benefit of the wrong doers, whose rights as between themselves are thus made paramount to his rights against them all.

13th.—If any necessity or propriety exists for adjusting the relative rights of the owners of the offending vessels, as between themselves, it is always competent for them to implead each other Contribution between wrong doers, as between themselves can be compelled, and no right of contribution is lost because the injured party seeks his remedy against the one most able to respond in damages. It was competent for the owners of the *Atlas* to have applied to bring in the owners of the *Kate* if they desired to enforce a contribution from them, and it is still competent for them to enforce their rights against such owners for a contribution. The sole question here is, whether the libellants must take the burden and risk of attempting collect from the owners of the *Kate*, however unable they may be to res-

pond, the contributory share due from them to the owners of the *Atlas*, or whether that burden and risk belong to the respondents.

14th.—The suggestion that after the hearing, opportunity was given to the libellants to join the *Kate* (*See Opinion, Rec.*, fol. 142 and 4 Ben., p. 28), is without force. The record shows no order or proceeding by which any such leave was granted, nor was any such order made. The statement in 4 Ben., p. 28, that the court directed proceedings to be stayed, to enable either party to apply to have the tug *Kate* brought into the action, is by the reporter, and is not founded on anything appearing in the record. At most, the action of the court must be taken as a mere suggestion of the judge, at some time between the hearing, May 3, 1869, and the order of reference, February 28, 1870, that the *Kate* might be brought in by either party. How far this might have been made available after the hearing was at end and the witnesses had been scattered, is not now ascertainable, but neither party availed of it. It was for the respondents to bring in their co-wrong doer if they desired a settlement and adjustment of their rights as between themselves in this action. It is unprecedented that the rights of innocent parties should be made to depend upon their bringing in all the wrong doers at any stage of the proceedings as a condition precedent of their right of recovery against either, and for the protection of the wrong doers themselves.

Second Point.—The court below properly held the *Atlas* in fault for the collision. It erred in holding that the *Kate* was also in fault.

1st.—The *Atlas* was moving through a thoroughfare for vessels, on a dark night, at the rate of ten miles an hour without any lookout. The weight of evidence shows that she not only had no lookout, but also that she had no side lights set and burning as required by law, so as to be seen by the *Kate* (*see testimony of libellants witnesses, fols.* 31, 32, 38, 47, 52, 55, 60). The fact that the first indication of her presence was her whistle, and that no red or green side lights were then visible, is in proof; and even if the testimony of those on the *Atlas*, as to her lights, is accepted as true, it is not inconsistent with the fact that the lights were not seen on the *Kate*, although she had only started from New Brighton ten or fifteen minutes before, and those in charge of her were on the alert. But even if the *Atlas* had the proper lights, this did not exonerate her from the duty of keeping a proper lookout, and it is conceded that she did not have any lookout. This was a direct violation of law, as well as of the ordinary precautions of navigation.

The Genessee Chief, 12 How., 443.
The Ottawa, 3 Wall., 268.

The evidence clearly shows that the want of a proper lookout on the *Atlas* was a principal cause of the collision. The weather was clearing and the lights of vessels were easily discernible. According to claimant's own evidence, a vessel without a light could have been seen at a distance of a quarter of a mile (*Durham, fol.* 78), yet the light of the *Kate*, or of the schooner in her tow, admitted to have been seen, was not seen on the *Atlas* until just before the collision. This is not a case in which the absence of the lookout can be held to have been immaterial as not being one of the contributory causes of the disaster (see

The Farragut, 10 Wall., 334; *The Fannie*, 11 Wall., 238). It directly contributed to the collision. The district and circuit judges were therefore right in holding the *Atlas* in fault for want of a lookout.

See Opinions, fols. 136, 178, 184.

2d. The fact that those navigating the *Atlas* mistook the direction in which the *Kate* and her tow were going, and continued under that mistake up to the time that the two whistles of the *Kate* were blown, is a strong corroboration of negligence of the *Atlas* in respect to the lookout and to the want of proper vigilance required of those in charge of her. If the presence and approach of the *Kate* had been discerned, as they ought to have been and could have been, the *Atlas* might have avoided the collision. At least it cannot be said that it would have been impossible to have avoided it.

3d. In view of the irreconcilable conflict of the evidence it is almost impossible to apply with any certainty the regulations of the navigation law so as to charge fault in respect to their manoeuvers upon either vessel. If, as the learned district court held, the *Atlas*, having the *Kate* on her starboard hand, was at liberty to keep out of her way by porting or starboarding, as the case required, according to article 18 of the Navigation Laws ( ), then she was in fault for not starboarding, provided there was time to change her course. The district judge considered that there was not time, and that the case could not be made to turn upon the manoeuvers of either vessel (*Opinion, fol.* 135).

Mr. Justice Woodruff took a contrary view, and while condemning the *Atlas*, held the *Kate* greatly

in fault in respect to her movements. But his conclusions are based to a large extent on a disregard of the testimony of witnesses who were before the District Judge at the trial, and were not before the Circuit Judge, andin some particulars his remarks are not borne out by the evidence. He places the *Kate* on the port bow of the *Atlas*; wholly ignores the fact positively proved, that the tide and the position of the *Kate's* tow made it unsafe for her to attempt to pass on the port side of the *Atlas*, and entirely overlooks the positive evidence that the *Kate* stopped and backed immediately upon being apprized by the whistle of the *Atlas* of her intention to attempt to pass on the port side (*see Opinion, fols.* 169-177).

4. The sole fault imputed to the *Kate* by the District Judge was that of a negligent lookout. The lookout was on deck, on the starboard side of the wheel house, and in so small a tug as the *Kate*, this could hardly be deemed a fault.

5. The refusal or neglect of the *Atlas* to remain by the disabled vessels, and to render the assistance which they needed, was properly treated by the district judge as enhancing her fault (*see Opinion, fols.* 136-137).

Third Point.—The decree below should be reversed, and the cause remanded to the Circuit Court, with directions to enter a decree for the whole amount of the damages sustained by the libellants.

BUTLER, STILLMAN & HUBBARD,
Proctors for Libellants, The
Phenix Insurance Company.
WILLIAM ALLEN BUTLER,
Advocate.

Supreme Court

OF THE UNITED STATES.

The Steamboat ATLAS, her Engines, &c., the Camden and Amboy Railroad and Transportation Company,

Claimants and Appellants,

ads.

THE PHENIX INSURANCE COMPANY,

Libellants and Appellees.

Brief for Appellants.

W. R. BEEBE,

for Claimants and Appellants.

NEW YORK:
BENJ. H. TYRREL, LAW PRINTER, 74 MAIDEN LANE.
1876.

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THE PHENIX INSURANCE COMPANY,
Libellants & Appellees.

Brief for Appellants.

STATEMENT.

The libellant having paid the loss on a policy of insurance issued on the cargo of the lake boat *A. E. Hurd*, (sunk while in tow of the steam tug *Kate*, by a collision with the steamboat *Atlas*), claims to recover the amount so paid, as damages, occasioned by the negligence of the officers and crew of the *Atlas*, in causing such collision.

It is obvious from the fact that the *Kate* was not libelled, and that her officers and crew to a man are offered as witnesses in support of the libel, that the contest in the case is really between her owners and

those of the *Atlas*, and that the libel was filed and the suit prosecuted in her interest and on her behalf.

Indeed, the whole evidence in the case tends to show that the suit is a flagrant attempt to shield the *Kate* from the consequences of the folly and mismanagement of those in charge of her, by an assault upon the *Atlas*, as malevolent and vindictive as it is unfounded and uncalled for. The burthen of defence is thus shifted from the *Kate*, and her unlicensed pilot and somnolent engineer, her panic-stricken fireman and deckhand join the libellants in pursuing the innocent *Atlas*, with all the zeal and celerity which usually characterizes a *particeps criminis* when he turns State's evidence, and which proverbially distinguishes the *fox* when he appears in the role of the *finder*.

The cause was tried in the U. S. District Court for the Eastern District, before his honor Judge Benedict, and a decree was made by him on the 28th day of February, 1870, by which decree it was ordered, adjudged and decreed that the libellants recover against the *Atlas* one-half of the damages sustained by the libellants by reason of the collision, and that the *Atlas* be condemned therefor.

From this decree, adjudging the *Atlas* liable for, such damage or any part thereof, and condemning her therefor, this appeal is taken to the Circuit Court.

THE FACTS

in the case are briefly as follows:

On the morning of the 18th of March, 1868, about one-quarter past three, A. M., the propeller tug *Kate* having three boats in tow, left New Brighton, Staten Island, for New Brunswick, N. J., and "*proceeded across the Kills, a little quartering and running up*" (*Capt. Reed, of the Kate*, fol.

36), "heading for the Copper dock" (*James H. Reed*, fol. 159). The Kills, at this point, are about a quarter of a mile in width (*Capt. Reed*, fol. 36). The tide was flood, and it was *very nearly high water* (see any almanac of the date), and did *not*, as testified by Capt. Reed (fol. 36), lack anything like an hour and a half of being full. (Particular attention is directed to this circumstance, as the state of the tide is relied on by Reed as excusing his misconduct in the mismanagement of his craft.) See, also, testimony of Capt. Durham (fol. 66), who says, "*it was very near high water.*" When about two-thirds of the way across the Kills, Capt. Reed, of the *Kate*, who was at the time at her wheel, heard *one whistle* from "*up the Kills*" (fols. 36 and 41). It came from the *Atlas*. The *Atlas* was, at this time, coming down the Kills, "near the middle of the river," "heading S. by E. ½ S." (fol. 65); the *Kate*, when discovered, bore off the "larboard bow" of the *Atlas* (fols. 67, 267); the course of the *Atlas* would then have carried her clear of the *Kate* to port (fols. 70, 86). The *Atlas* immediately ported more, and blew her single whistle.

On the "instant," as he says (fol. 80), and apparently without stopping to consider the disastrous consequences inevitable upon so ill-advised a proceeding, Capt. Reed immediately STARBOARDED HIS HELM, AND BLEW TWO WHISTLES (fol. 36). *The course of the Kate was changed* (fol. 105). Conley says, in his *deposition* (fol. 30), "Before the crash, and after her two whistles, the *Kate changed her course* from heading up the river to *heading across to Staten Island*," throwing herself directly across the bows, and in the path of the approaching steamboat (fol. 85). The vessels were then in such proximity that a collision could not be averted either by stopping or by a change of course on the part of the *Atlas* (fols. 70, 85). A crash ensued. The *Atlas*, coming down the Kills

and altering her course from that prescribed by law, usage, and her own signal, in obedience to the mischievous signal of Capt. Reed, in the vain hope of averting or lessening the damage of a collision, which the action of the *Kate* had rendered inevitable (fol. 68), "struck the *Kate* on the starboard side, about abreast of the engine-room."

In this statement of facts we have confined ourselves to the case, as presented by the libellants themselves, and to facts which are entirely undisputed.

We suppose these facts to be conclusive upon the libellants, in establishing the entire innocence of the *Atlas*, and in charging the *Kate* with the whole responsibility of the collision.

There are, indeed, some collateral issues, upon which the testimony is conflicting—such, for instance, as that which relates to the character and condition of the lights of the respective vessels.

As usually happens in collision cases, the witnesses on the *Kate* did not see the lights on the *Atlas*, and the witnesses who were on the *Atlas* did not see the lights on the *Kate*, and both sides are positive that their own lights were trimmed and burning.

An analysis of the evidence will certainly exhibit a vast preponderance of testimony in favor of the view that, as respects the *Atlas*, at least, her proper lights were all burning and in their proper positions. And as the burthen of the libellant's case *rests mainly upon the allegation of negligence in this regard* on the part of the *Atlas*, we will proceed to a more minute consideration of the testimony as to lights than would otherwise be necessary.

I.

As to Lights.

I -Did the *Atlas* have proper lights?

1*st*. What is the *libellant's* testimony on this point?

Capt. Reed says (fols. 36, 38, 46,) when the *Atlas blew her whistle*, I looked for lights; the *Atlas* had no side light; I saw *spar* and *headlight*.

After that he did not "*notice*" whether she had lights, as he was looking *all the time* to see what she was (fol. 46.)

And again, after the collision, he did not "*notice*" whether the *Atlas* or *Julia* had lights, "*as I was busy*" (fol. 47.)

Jas. H. Reed says (fol. 59.)

Q. Did you see any white light ahead of you?

A. No, sir; I did *not take notice* of any *white light*.

Q. Did you observe the *Atlas* when she came to you just before the collision—was there any light on it?

A. No, sir; I could not SEE any.

He SAW no lights on *Atlas*—not even the *white lights that the Capt. and Wm. Conely* saw!

Wm. Conely says: his deposition (fol. 31.)

"When I heard the whistle I looked ahead for lights and SAW only a white mast-head light."

And subsequently he says, that the *Kate* was *between him and the Atlas* (fol. 32.)

Taylor does not pretend to have been in a position where he could see them, and did not look (fol. 51.)

Sterrit, the only other witness, undertakes to swear positively as to the matter (fol. 55), but it appears that his observation was from and

under the guard of the *Atlas* from the *Kate's starboard* side (fol. 57), points from which it is *proved the side light-boxes cannot be seen* (fol. 71.)

The proof of the libellant, then, on this point, rests on the testimony of *two* men who *didn't* see, and *two* men who *couldn't* see; with that of one, Conely, whose ability to see was at least doubtful.

2. Against this *negative* testimony, we have the affirmative and uncontradicted statements of *seven* men, Durham, Parisen, Walker, Culver, McKenna and Van Deker, all of whom *did* see the side lights of the *Atlas;* Capt. Schenck's testimony is to the same effect.

Capt. Durham says: "As soon as the collision occurred I *stepped* out to look at them to see if they were burning, that is, the after lights and the two wheel-house lights; I did not go down on the bow; they were burning" (fol. 70.)

Mr. Parisen, the pilot, says: "After the collision he looked at the lights from the pilot-house, and the green, red and stern lights were burning (fol. 87.)

Walker, engineer, was on the upper deck after the collision, and saw the wheel-house and stern lights burning (fols. 117, 118.)

Culver climbed up the ladder from the deck to the upper deck, and saw the starboard and port lights (fol. 121.)

Vandeker, captain of the *Hurd* the vessel for whose loss this libel was filed, *saw the Atlas' lights* from *the deck* of his vessel in the *rear of the tug, before the whistle* from the *Atlas was blown* (fol. 124.) and

McKenna, whose business it was to attend to the lights, who lighted them that night, looked at them several times on the trip;

examined them immediately after the collision, took them down and blew them out at New York the next morning; says they were brightly burning all the time, and he had not interfered with them (fols. 95, 96.)

It is further proven that the lights of the *Atlas* were *six* in number—*two* on the bow, and that *they* were burning is conclusively proven by the fact, that as the *Kate* approached she was illuminated, and made out by these bow lights, as is sworn to by at least two of the witnesses, Capt. Durham (fols. 69–79), and Parisen (fols. 69, 87), a green light and red light, with additional reflectors, and *two* stern lights.

It is impossible, with this array of witnesses swearing so unqualifiedly to the fact, to suspect that the *Atlas'* lights were not burning, as they have stated. They could not be mistaken, they *saw them.* To hold that they did not would be most unjustly and unwarrantably convicting them, *all* of them, of a wholesale perjury, frightful as it is unproven.

Nor is it necessary, then, to hold that the *libellant's* witnesses have forsworn themselves. It is enough that they *did not see* the lights, It may have been wanton negligence—it may have been careless inattention—it may have been simply the blindness of a moment of sudden peril—they did not see them—it may be true, but that the *Atlas'* lights, all of them, were not brightly burning on that night, rests on no shadow of *proof.*

II. *Had the Kate proper lights?*

We attach little importance to this question, except as corroborative testimony as to their want of care and bad management.

We insist that they had not.

And what is important to notice in this connection, none of the libellant's witnesses swear that she had. They only say that she had when they left New Brighton.

Capt. Reed says: "The last time I noticed my lights was when we were leaving the dock" (fol. 42).

Reed says: "I did not see the *Kate's* lights after leaving New Brighton" (fol. 51).

Sterrit says he did not see her side lights (fol. 56).

Taylor says, "The last time I saw the *Kate's* lights was just as we left the dock" (fol. 59).

He afterwards says he saw them later, but his testimony is a mass of contradiction on this point.

Conely, the only remaining witness, says he can't say after they left the dock (fol. 32).

On the other hand, *six* of the claimant's witnesses say the *Kate* had no side lights.

Durham, Parisen and McKenna, in the pilot-house, were watching the *Kate*, and looking for lights from the moment she was first seen, and swear positively that she had no side lights burning.

Culver says he looked to see, and discovered only one on the *Kate's* deck (fols. 66, 67, 76, 83, 86, 92, 94).

Schenck swears to the same effect (fol. 107).

Vanderdecker says he saw none (fol. 125).

It is hardly possible that she had them, or good lights, and they not be seen; and poor lights are no lights.

Ward *v.* Chamberlain, 5 Amer. Law Reg., 339.

But they admit they had no *bow* light. The only lights they claim to have had were side-lights and a light at the stern!! (fol. 42).

Art. 3, of the Act of Congress (act of April 29, 1864), requires all vessels under steam to carry a *bow-light*.

Rule 7, of the Supervising Inspectors, requires the same.

And Art. 4, of same Act of Congress, requires steam vessels, engaging in towing, to carry *two* bright white *mast-head lights vertically*.

There is no pretence that the *Kate* had these.

In Fitch *v.* Livingston, 4 Sanf., N. Y., 512, we have the views of the learned Judge, and of Mr. Justice Betts and Mr. Justice Nelson, as to the necessity of a bow-light ; it is held to be negligence to be without it, and rendered the faulty party liable in damages.

The attempt will doubtless be made to impugn the veracity of the claimant's witnesses, in respect to the lights on the *Atlas*, by an argument drawn from the position of some of the witnesses, who testify that after the collision, they saw the side-lights of the *Atlas ;* and it will be contended that such lights were not, and could not be, if their boxes were properly constructed, visible from the position which such witnesses occupied. The argument is ingenious and specious, but utterly fallacious. When a man speaks of seeing a light, he does not, necessarily, mean to assert that he sees the lamp which *emits* it. He does *see the light*, and can swear that it is burning, when he sees objects within its range illumined by its rays. I, myself, have recently *seen the light* of a meteor in the heavens, when lying on my back, in my bed, in a position whence the meteor itself, and the nucleus of its light, could not possibly be visible—through the closed window blinds, which yet allowed of the admission of light, sufficiently to attract my attention, and to

enable me, if need be, to testify that I *saw* it. It is in evidence, and not disputed, that the side signal lamps of the *Atlas* are provided with powerful reflectors, and such being the case, it will hardly do to convict of perjury Captain Schenck, McKenna and Parisen, because,, forsooth, they swear to having observed the light of those lamps from positions, whence it may possibly be, that the lamps themselves where not within the visual line.

The colored lights cast a flood of red and green light across the surface of the wheel-houses which can be seen from any part of the forward part of the vessel where the wheel houses are visible.

III. But there is one view of the case, to which we have not averted. And this we deem conclusive upon the question of the *Kate's* liability, and here again we are willing to rest on the libellant's own testimony.

What if we had no lights? Conceding, for the purpose of the argument, that we were sailing without lights, would we therefore be responsible for this collision? If so, upon what ground?

We deem this whole subject of lights as immaterial to the question of liability in this case, upon the facts as exhibited by the libellant.

The questions of fact to be determined by this Court are only two:

1st. Was there anything to prevent the *Kate's* keeping to the right when she discovered the *Atlas* and heard her whistle?

2d. Was it possible for the respective vessels to so change their courses when the two whistles were blown by the *Kate*, that the collision could have been avoided?

We think it is shown conclusively that the *Kate* could have gone to the right, as the law directs, or at least have safely kept her course (and so kept out of the way), when there would have been no collision.

Reed, captain of the *Kate*, says: "Inside of where the collision occurred you could carry nine feet, into the docks. Large vessels are in the habit of going into those docks—schooners and propellers—in fact, we all run in there at the right state of the tide" (fol. 42).

The only reason the *Kate* gives for not going to the right was absurd on its face. He "could not cross our bows" (fol. 37). Our whistle told him we were going the other way. We shall later consider this excuse more at length.

And second. His own statement of the fact shows, his own course admits, his *instantly* stopping and backing on blowing two whistles shows, that when he gave two whistles the courses of the vessels could not be safely changed.

He therefore erred in directing us to change and in turning the course of his own boat. He is convicted out of his own mouth. The responsibility of the collision rests with him.

Whatever might have been the result had he seen lights on our vessel, if, with the information he had, he himself blundered, he cannot hold us responsible. Even if we had no lights, if neither had lights, liability is not to be imposed from this fact.

Both vessels saw the other in time to avoid the collision—the *Atlas* gave one whistle and turned to the right as she was bound to do. She would have cleared the *Kate* had she simply kept her course.

The *Kate* might have kept her course. She does not deny it, except upon the false and absurd statement about crossing our bows.

But she blunderingly gave two whistles, knowing it was wrong and futile, and so *caused* the collision which otherwise would have been avoided.

II.

The second alleged ground of complaint on the part of libellants, is that the *Atlas* made no reply to the signal of the *Kate*, in blowing her two whistles.

1. It was not her duty to reply.

We have been unable to find any rule either of *law* or *custom* which required her to do so. On the contrary, the rules adopted (October, 1857) by the Board of Supervising Inspectors for the Government of Pilots, and the explanatory diagrams and descriptions of "Situation" also part of the rules, prescribe their duty as follows:

> RULE.—1. When steamers meet "head and head," it shall be the duty of each to pass to the right or on the larboard side of the other. And *either* pilot, upon *determining* to pursue this course, shall give as a signal of his intention *one* short and distinct blast of his steam whistle which the other shall answer promptly by a similar blast of the whistle.
>
> But if the course of each steamer is so far on the starboard of the other as not to be considered by the rule as meeting "head and head," or if the vessels are approaching in such a manner that passing to the right (as above directed) *is deemed unsafe*, or contrary to rule, by the pilot of either vessel, the pilot so deciding, *if no signal has been previously given by either vessel*, shall immediately give *two* short and distinct blasts of his steam whistle, which the other pilot shall answer promptly by *two* similar blasts of his whistle, and they shall pass to the left, or on the starboard side of each other.

But finally and conclusively, the regulations of the Board of Supervising Inspectors *forbid*

two whistles, as appears by the following "Circular," issued, printed and circulated by the Board, October, 1858.

"The following circular has been issued by several of the Supervising Inspectors, for the purpose of informing pilots within their respective districts, of what is understood by them to be the true and exact meaning of the pilot rules, and of that interpretation of the same by which they shall be governed in the examination of any alleged infraction thereof.

CIRCULAR.

"EXPLANATION OF THE RULES."

In no case should a pilot, under *Rule* 1*st*, on receiving a signal by ONE blast of the whistle, *answer* the same with TWO *blasts ;* neither should any pilot, on receiving a signal by TWO blasts, answer the same with ONE blast (*even although the pilot first giving the signal may be in error,*) but *if he considers* that passing as required by the signal he has received, *will endanger his* vessel, or that such pilot has not given the proper signal, he should, according to Rule 3d, immediately notify the pilot giving the erroneous or dangerous signal, of his disagreement, by giving SEVERAL short, rapid and distinct blasts of the whistle, when, if the vessels have approached within HALF A MILE of each other, they are both to be slowed to a speed barely sufficient for steerage way (and if the weather will permit, they should be fully stopped), and after proper time allowed to avoid any connection with previous signals, *the pilot who gave the original signal* should again signalize his determination to pass to the right or left ; and if the other pilot still objects, he should signify the same by several short blasts, as above specified, and lie by until the other boat shall have passed him.

In case of steamers approaching each other in an oblique direction, as shown in diagram of "Fifth Situation," no deviation from the manner of passing there laid down is authorized under any circumstances, and steamers in this situation should, in all cases, PASS TO THE RIGHT."

See Report of Proceedings of Board, October, 1858, page 80.)

(The rule of the last clause of the circular, relating to the "Fifth Situation," has since been changed by Article 14 of the Act of 1864.)

That the courses of the respective boats were "*head and head*," appears so conclusively from all the proofs, including that of the libellants, that we apprehend it will not be questioned.

Any other view will bring the *Kate* within the provisions of Article 14 of the Act of April, 1864, making her fault fully as flagrant, as that would impose upon her the obligation of *keeping out* of the way of the *Atlas*, and subject her to the penalty of obstructing our course.

And there can be no question that the "Rules and Regulations" of the Board of Supervising inspectors are the *law* of this case.

The Board was created by Act of Congress, passed August 30, 1852, Chap. 106.

By Section 29 of the Act, it was made "the duty of the Supervising Inspectors to *establish such rules and regulations, to be observed* by all such vessels (in said act named) in passing each other, as *they* shall *from time to time deem* necessary for safety, * * * which rules *shall be observed* both night and day," and it imposes a penalty for "*neglecting to observe* the foregoing *regulations*."

And by Section 9 of the Act of Congress of July 25, 1866, "*All vessels propelled* in whole or in part by *steam*, and navigating the bays, inlets,

rivers, harbors and other waters of the United States (except foreign vessels) *shall be subject to all rules and regulations* consistent therewith, *established* for the government of steam vessels in passing, *as provided* in the *twenty-ninth section* of an *act* relating to steam vessels, approved the *thirtieth day of August, eighteen hundred and fifty-two.*"

It was then the *duty* of the *Atlas*, to pass to the right, as well also the duty of the *Kate*.

See also Article 13, Act of April, 1864.

The pilot of the *Atlas having so determined* gave the proper signal. The *Kate* thereupon blew *two*, alleging as an excuse, that she deemed the course to the right unsafe. Whether she was right in so doing, we pass for the moment, to consider the point we are now discussing, to wit: the duty of the *Atlas* to reply.

The rule above cited only called for a reply of two whistles, when "no *signal has been previously* given." Such signal had been given. And now it only remained for the *Atlas* to avoid the calamity which the *Kate* had thrust upon her, as she best might, whether she did her duty in this effort we shall presently see.

Rule 3, of the pilot Rules, provides for a case where "the pilot fails to understand the course or intention of the other," his doubt to be signified by "giving several short and rapid blasts of the steam whistle" and immediately slowing, &c.

Here there was no mistake or doubt of the *course* or *intention* of the *Kate*. It was apparent that she was intending and attempting to pass to the left.

There was no obligation for the *Atlas*, from this rule, to give other signals.

II.—The *Atlas* would have *erred* had she replied with either one or two whistles.

One whistle would have been but a reiteration of the declaration she had already made, adding to it no greater strength than the silence which sealed an intimation that no other signal could safely be given. It would have but confused the *Kate*, have been an instruction to her to change her helm, when her head having already been turned to left, an effective change of course at that late moment would been impossible and even more fatal.

Two whistles could not have been given, for that would have been an affirmance and endorsement of a movement on the part of the *Kate*, which the *Atlas* knew could not be safely executed, and so would have made herself a party to the fault.

III.—Any reply to the signals of the *Kate* would have been entirely ineffectual for any purpose.

This is abundantly showu by the libellant's own testimony, the time was too short, the vessels too near together. The *Kate* was heading across the bow of the *Atlas*, she could not keep on, nor could the *Kate* then change, had the *Atlas* signaled her to do so. The *Atlas* assumed she would keep on the left, in following out her signal. All that could be done by the *Atlas*, was to do her utmost to spare the damage. To tell them to stop and back (by short blasts,) was to tell them to do what they had already immediately done. This the *Atlas* also did at once. And therefore the giving or not giving, of danger signals by the *Atlas*, would have had no effect whatever upon the collision.

On the libellant's own showing, all was immediately done that signals from the *Atlas* could suggest.

The *mischief was done* when the *Kate blew two whistles, and starboarded her helm.*

On the only charges of misconduct then laid to the claimant, the libellant must fail, and the burden of the collision must be sought elsewhere.

III.

In connection with this collision, the *Atlas* was without fault, and the responsibility does not rest with her.

And here we beg leave to refer to our answer, and claim that it is sustained by the *evidence in every particular.*

In the words of the Third Article. "These respondents insist that the persons in charge of said *Atlas* used the utmost care, skill and caution, in her management. (Testimony *passim*. That *as soon as* they discovered the light ahead, they endeavored to *pass to the right*, (Durham, fol. 67. Parisen, fol. 84. McKenna, fol. 93, as they were bound by law to do, (Rules I and Article 13,) that they immediately gave the necessary signal, by *blowing one whistle*, to indicate their design so to do, and as a warning to the vessel or vessels ahead.

That when the two whistles were blown by the *Kate* it was *then too late to alter the course* of the *Atlas*, or to pass *the Kate and her* tow on the *starboard* side (Statement of facts by libellant's witnesses, Durham, fol. 69. Parisen, fol. 85, 87; McKenna, fol. 95; Vandeker, fol. 126, &c.,) but that the *Atlas* immediately did all that it was possible for her to do, to avoid the collision by *reversing her engines, and starboarding her helm*, that the *Atlas* was *stopped and backed as quickly as was*

possible, after the signal from the *Kate*, and that the wheels *of the Atlas were moving* backward continuously from the moment the two whistles were blown by the *Kate*, until after the collision with the tow." (Durham, fols. 68, 82, and subseq.; Parisen, fols. 84, 85, 87; McKenna, fol. 93; *Pancost*, fol. 102, &c., &c.

And *thus* we might take the whole answer, and verify it, sentence by sentence, by reference to the testimony.

It was no blunder of the *Atlas*, in giving the whistle and turning to the right, before the character and course of the vessels ahead were definitely determined. If they were going in the same direction with the *Atlas*, as at first supposed, it was still the duty, *by rule* 6, an explanatory rule adopted by the Board, Oct. 1858, to give the signal, and turn the wheel, as if they were *known* to be meeting.

(See page 38, of report of proceedings of the Board, Oct., 1858.)

It is, perhaps, hardly necessary, but we beg the Court to indulge us while we take a hasty review of the overwhelming testimony on these points.

When the light was first seen, it bore *a little over the larboard bow* of the *Atlas*.

Capt. Durham, fols. 66, 77; Parisen, fol. 83; McKenna, fol. 92.

The *Atlas* was then heading "*E. by S.* ½ *S.*," or, as the captain of the *Hurd* says, to "*Staten Island shore.*"

Durham, fol. 66; Parisen, fol. 83; Van Decker, fol. 124.

The *Atlas* thereupon immediately "*ported her helm.*" McKenna says, "commenced heaving a port." "*Blew one whistle*;" then "*Ported hard over.*"

Durham, fol. 67, 76, 81, 82; Parisen, 84; McKenna, 93.

The respective vessels were now rapidly closing the gap between them. But the *Atlas* apprehended no difficulty *as there* WAS NONE, in passing the tow on the *right*, as it was the duty of both to do. The *Atlas* had been *all the while* moving to southward of the tow, and, now under the action of her ported wheel, was veering more rapidly in that direction.

When, suddenly, *two whistles* came from the *Kate*. This told them the *Kate* was crossing *their bows*—that a collision was all but inevitable. No time was to be lost. No disposition on the part of the *Atlas*, by lying idle, to let the *Kate* bear the penalty of her mistake. The *Kate*'s folly did not interfere with the most zealous effort by the *Atlas* to avoid the collision or weaken its force. To keep on would be certain destruction to the vesssels now lying across her path. To effectually change the course of a vessel of the size and speed of the *Atlas*, with a heavy barge at her side, now under the influence of a ported wheel, within the time and space that was left, so as to clear the tow, seemed, and as the result proved, *was*, impossible. All that she *could* do, the *Atlas* did *at once*.

Capt. Durham immediately rung *four* bells to slow, stop, and back, following them with the *jingle bell* to *back strong*. The pilot immediately, *in obedience to their signal*, "let the rudder go amidships, *and hove it hard-a-starboard*." The *bells* all "*followed each* other as *rapidly as was possible*." And *were instantly obeyed* by the *engineer in charge*. Capt. Durham, at the same time, shouting to the captain of the barge to starboard *his* wheel, which order was also obeyed.

Capt. Durham, fols. 68, 79, 81, 82; Parisen, 84, 87.

McKenna, 93-4; Pancost, Engineer 102, Schenck, 106.

Thorpe, 114, 116; Walker, 117; Culver, 119.

The *collision then* took place almost *immediately*!

Was there time, or was it possible for the *Atlas* to do anything else, or to get out of the way?

The principal witness for the libellant, the captain of the tug, thought not, for when he gave his two whistles he made no effort to move out of the way, not even to follow the course he had deliberately chosen, and signalled the *Atlas* to take, but, as he says, "*immediately* stopped and backed" (fol. 36).

The *Atlas*' wheels were moving backward continuously from the time the two whistles were blown until she was clear of the tow.

Durham, fol. 68, *et subseq.*
Pancost, 102, 104.

Under the influence of her momentum, however, she continued to move ahead after striking the *Kate* until they came in contact with the tow, when they backed out and stopped.

Durham, Pancost, and others.

Is it necessary to refer to what followed?

Is the subject of assistance offered or not offered, of any relevancy whatever in this action?

The question is not here, what is the *amount* of damage for which the party in fault is liable; but who is responsible for the *collision?*

If the *Atlas* had stood by till the end, and done all that succor could do, we should still have been called here to meet this same question of liability for the collision.

If we are liable for the collision, the damages will be ascertained in the proper way. If we are *not* liable for the collision, and the rendering of assistance is a proper subject for judicial inquiry, the limit of our responsibility is the value of the property we could have saved only, and should we be found guilty of this charge, we claim that the decree shall be so expressed.

We cannot believe that this line of evidence has

any bearing whatever on the issue before the Court, but as the charge has been made we have met it.

We heard no calls for help. Taylor, a witness for libellants, himself refutes the charge that we kept right on our course (fol. 51). We stopped, called repeatedly to them to ascertain if they wanted assistance; and only in the belief that they had sustained no serious injury, backed out and around them and continued to New York, and did not know that they or either of them were sinking (fol. 69).

The reference of the learned judge below (fol. 136) to the clause of the Merchants' Shipping Act of England, which "provides that in case of failure on the part of a colliding vessel to render assistance *without reasonable excuse*, the collision shall, *in the absence of proof to the contrary*, be deemed to have been caused by her own wrongful act, neglect or default," has no relevancy here, for such proof to the contrary is complete and unimpeachable.

We might with propriety stop here, and rest the case upon our own exoneration, which we claim to be complete; but

IV.

The calamity was occasioned solely by the bad management of those in charge of the tug *Kate*.

Starting from New York, the libellant's story is full of evidence of the *incompetency* of the *Kate's* crew, and here we find a sufficient explanation of all that followed, and the chief cause of the disaster.

Starting from New York, he so ignorantly or carelessly secured his tow, that the *Hurd* refused to proceed with him beyond New Brighton, convinced of his inefficiency and apprehensive of danger (fols. 126–127).

Leaving New Brighton he, heading across the Kills, conscious (we accept his own statemet) that he could not pass an approaching vessel on that side, took the tow two-thirds across to a point where it was nearly unmanageable, where, as he says (fol. 36), "the flood tide was carrying my tow up toward the Staten Island shore, as fast as we were pulling across."

Her pilot *had no license*—her engineer was *asleep* below—her engines in charge of a mere boy, who after the collision deserted his post, and hurried "in a *short* space of time" (with emphasis) aboard the *Atlas*, not knowing, not waiting to see whether his master gave him any other signals after the bell to back (fols. 45, 50, &c.)

They heard one whistle, and saw the light of an approaching steamer, and knew it was crossing to the right. What then did they do? Blew *two whistles*, and "immediately" (fol. 36), *starboarded their wheel!*

What did he do this for? Did he expect to pass to the left? No, he knew he could not do it; he knew the distance and time was too short. He says it was only one-eighth of a mile (660 feet), when the *Atlas* blew. His own craft, (tug, hawsers and tow) was half that distance long. No, he blew two whistles—starboarded his helm—and at the same instant, "*as soon as I blew my whistles*" (fol. 43) *stopped and backed!* Almost immediately came the crash. "The crash came almost as quick as the bells" (fol. 54). "I had not time to get out of my berth" (fol. 54).

He complains that the *Atlas* did not answer his bells. What answer did he expect? He waited for none. He knew that none could come in season. He knew he could not pass to the left—yet he had starboarded his wheel. Conely says,

"*The Kate had changed her course across the river*" (fol. 30.) He had already checked his headway, while the *tow was still heading for the Jersey shore*, (Conely, fol. 31.)

He well knew he was wrong. He says (fol. 45): "the boat that blows the first whistle has the right of way." "If you see you are going to collide, the law says, stop your engine and lay still." (He does not say, *blow two whistles* and lay still). Then in answer to the question:

"Q. What is the rule when the vessels are so near together that you cannot take either course?" (and this was the *Kate's* view of the situation, if her action shows anything but blunder and stupidity).

"A. GIVE THREE SHORT WHISTLES and then stop your engine."

Did he do this? He says not.

The rules are plain:

Rule 1.—Prescribed that the respective vessels should pass to the right, giving one whistle, &c.

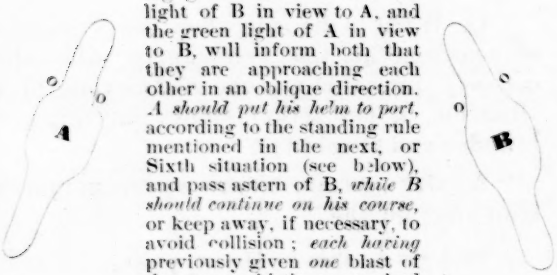
"If this is deemed unsafe, the pilot so deciding, *if no signal has been previously given by either vessel*, shall give two whistles," &c.

Article 13 of the Act of April, 1864, is to the same effect, requiring the *Kate* to pass on the port side.

Rule 2.—(Which describes the respective situations of these very vessels, according to the theory most favorable to the libellants, namely, that the *Atlas* bore "off their starboard bow," a statement most absurd, and completely refuted by their own testimony, as we shall presently show), prescribes: "When steamers are approaching each other in an ob-

lique direction (as shown in diagram of 5th situation, see below), they will pass to the right, as if meeting 'head and head,' and the signal by whistle shall be given, and answered promptly, as in that case specified."

"FIFTH SITUATION."



"This is a situation requiring great caution. The red light of B in view to A, and the green light of A in view to B, will inform both that they are approaching each other in an oblique direction. *A should put his helm to port*, according to the standing rule mentioned in the next, or Sixth situation (see below), and pass astern of B, *while B should continue on his course*, or keep away, if necessary, to avoid collision; *each having* previously given *one* blast of the steam whistle, as required by the rule when passing to the right."

In this case *both* vessels *knew* the direction in which the other was going. The whistle of the *Atlas* told the *Kate*. The *Kate* does not pretend she did *not* know it.

Article 14 of the Act of April, 1864, which describes the position of "Situation Fifth," while it relieved from an absolute injunction to pass to the right in any case, required the *Kate* to keep out of the way.

Did she do it?

Rule 3 says: When the course of either is not understood, either through fault in answering signals or otherwise, (and this was not the case of the *Kate*, and such her complaint), she shall immediately give several short and rapid blasts, &c.

Did she do it?

Situation 6, which illustrates Rule 1, says: A pilot may deviate from the "*standing rule*," of passing to right "*for good reason*," but he shall *give early notice* of such intention.

Did he do it?

Assuming that the *Kate* could not pass to the right. If either party is in fault for not giving further signals, it was the *Kate*, who, if she could not, or thought she could not reply to the *Atlas* with one whistle, should have given the signal of the danger, when she saw—for the *Atlas* saw no cause for anxiety—the peril she was in, and that she did regard her position as perilous, is proved by the pilot's statement, and by what he did.

On the libellant's own statement, then, he was culpably negligent.

On seeing the *Atlas*, and getting warning of her course, he, conceding that he could not go to the right, gave the wrong signals, and turning his boat toward the Staten Island shore, stretched himself across our known path, thus precipitating the collision.

But there was no occasion for a deviation from the standing rule—this is abundantly shown; the libellant admits that there was room enough; the testimony is conclusive that had the *Kate* not blown two whistles; had she simply kept her course, making no effort to turn either way, the *Atlas* would have given her a wide berth.

Durham says we would have cleared her where she was, 50 feet (fol. 71).

Parisen says "if we had kept our course, we would have nearly cleared;" that is, if we had kept on in spite of their two whistles, knowing they had stopped, and "if they had kept their course we would have cleared well enough" (fol. 86).

So says *McKenna* (94), and Vandeker (126).

And we are not to be held liable for the *Kate's* errors of judgment.

But what is his excuse or reason for not keeping to the right?

A pilot must have, in the language of the Regulations of the Board of Supervising Inspectors, "*good reason*" for a "*deviation*" from the "*standing rule.*"

And the pilot of the *Kate* gives *one*, and suggests another; let us examine them.

ONE.—That he *could not get across her* (the *Atlas*) *bow* (fol. 37). *Cross our bows!* Why what did he in fact try to do? He *knew* we were heading to the right—our whistle told him so—and yet he did not keep to the right, *because* he could not *cross the bows* of a vessel that he *knew was heading the other way!*"

Its mere statement is enough to condemn it.

The *other*, the suggested reason, is that the *tide* rendered it dangerous—that the *tide was carrying* him toward the Staten Island shore *as fast as he was pulling across!* (Fol. 36.)

This might have been an excellent reason for going to the left of a passing vessel under other circumstances—circumstances involving no danger; a most excellent reason for not venturing beyond the middle of the river. But he had *crossed two-thirds* of the width of the river *against it*—was still *making headway* at the rate of two and a half knots an hour *against it*—and *there is no pretence* that he could not *hold his own* on his own side of the river.

But we will examine further the truth of this last *suggested* reason.

Reed, captain of the tug, swears (fol. 38),

that his clock stopped at.....	3.40
(Fol. 47) that he sunk in not exceeding seven minutes after the collision.....	.07
A. M.	3.33

What now was the condition of the *tide* on the morning of the 18th of March, 1868?

It is a matter of which this Court can take judicial cognizance, and is established by any good almanac, that it was *high water* at the port of New York—

P. M., 4.20—At the *Battery*—A. M.....	3.55
" 3.26— " Sandy Hook— "	3.
	.55

Assuming then, to allow liberal margin that the tide was only ten minutes (it is in fact over fifteen) earlier in the *Kills* (more than one-third less than the distance from Sandy Hook to the Battery)..... 10

45

We have high water at the place of *collision*, at about a quarter of four 3.45

The collision then took place at about 12
twelve minutes before *high water*.

Now, it is well known that at that time, the tide is nearly *slack*.

It is then absurd and false that the tide exerted any such influence on the movements of the tow.

But this is further confirmed by the actual movements of the vessels *after* the collision. All the witnesses for the claimants swear, and it is not denied, on the contrary is sustained, by the accounts of the libellant's witnesses, that as the *Atlas* backed out, the *Kate*, which had been on the starboard side, *floated round upon the port side* of the barge *Julia!!*

Had the tide flowed, as the libellant states, the *entire tow* would, before the *Atlas* left, have *floated far toward* the *Staten Island shore*.

This fact of the tide and movements of the tow has a special significance as a test of the credibility of a witness who imputes such marvellous power to the slack of the tide, and who so confuses his testimony as to swear in another place (fol. 36), that it still wanted *one hour and a half* of high-water.

Upon every view of the case, the authorities cast upon the *Kate* the entire responsibility for the collision.

"If a steamer adopts proper measures of precaution to avoid a collision, which would have been effective if the schooner had not changed her course, the steamer is not chargeable for the consequences of the collision.

"The *Potomac*, 8 Wallace, 590.

"If a steamer wrongfully place herself in the track of another vessel, so as to allow her no chance of avoiding a collision, the former is answerable for the damage.

"The *Narragansett*, *Olcut*, 246.

"Baker *vs.* The City of New York, 1 Clifford, 75.

"Where a propeller, whose duty it was to keep out of the way (in compliance with article 14), took the most hazardous of the two courses open to her, she is responsible for the failure of success.

"The *Chesapeake*, 1 Benedict, 23.

"Where, it being the duty of the other vessel to keep her course, the propeller attempted to cross her bows, the *onus* is on the offending vessel to show a clear and undoubted special case of excuse.

"Same case on Appeal, 5 Blatch. 411.

"Where two steamers are crossing, it is the duty of the one having the other on the starboard, to keep out of the way, and the duty of the other to keep her course.

"The other failed to observe the rule, and such failure was the immediate cause of the disaster.

"The burden is on the one so in fault to show sufficient cause for her failure to observe the rule.

"The *Corsica*, 9 Wallace, 630."

V.

Of the attempt to impeach Captain *Vandeker's* testimony, we shall say nothing—it was a signal

failure; he was not contradicted in a single particular. We hardly care to dwell upon the discrepancies and contradictions in the libellant's testimony.

We are content with their version of the occurrence. How a vessel heading across the Kills, toward Copper Dock, *between* Port Johnson and Constable Point, could have Port Johnson off *their starboard bow* (fol. 37), is sufficiently absurd.

And how, when a whistle comes from *up the* Kills (fol. 41), from a vessel whose light was confused with Port Johnson lights, this whistle could be heard and her light seen off the *Kate's starboard bow*, was commented upon by the learned judge below.

And again Reed states that his vessel was *stopped and lying still* when the collision occurred (fol. 43). While Taylor, who was running the engine, says she was *still backing* and he did not stop her till *after* the collision (fol. 53). And of Taylor's testimony, who states that he had hold of the bar when the blow came, and afterwards stopped her and was not knocked down (fol. 53). When Steritt states that the blow was so great as to break off the cocks of the boiler, &c., and the engine-room full of steam, and he felt around for Taylor, expecting he was killed (fol. 55).

The animus of Reed's (J. H.) testimony is sufficiently apparent.

The whole complexion of the libellant's testimony, is to the effect that they were guilty of a grievous blunder—that they were afraid of the consequences and were intent upon the effort to screen themselves by fastening their guilt upon the *Atlas*.

One word more. We have asked the Court to note how completely and fully every allegation of the answer is sustained by the evidence; we beg the Court to notice for an instant how signally the libellant has failed in his proof of the allegations of his libel.

The libellant himself has proved that the *Kate* did not *take* her course directly for Port Johnson; that

the *Atlas*, when discovered, was *not* dead ahead; that she was *more* than one-tenth of a mile distant, that the state of the tide did *not* prevent her keeping to the right; he does not pretend that the "*conformation of the adjacent shore*" was any embarrassment.

He offers no evidence whatever as to "improper or unskillful management on the part of the *Atlas*." His evidence on the subject of the *Atlas*' lights is strikingly weak, and completely refuted.

His statement proves that the *Atlas* could *not* change her course and so avoid the collision, and offers not a particle of evidence to sustain his charge that the *Atlas* only *stopped* her engines and did not back them until after the collision. He fails to prove any refusal to assist them. His own witnesses show that the *Kate* was not well manned, and he falls short in his proof as to his own lights, or a light on the sunken boat (and this allegation the captain of the boat denies).

The case that he proved was not the case that he alleged, and on this proof he stands condemned.

There are yet minor points to which it would be proper to advert, but for the extreme length to which this discussion has already been extended. They will not be overlooked.

And in the confidence that all the evidence will receive that careful consideration to which it is entitled, and that in such case the decision cannot be adverse to the claimants, we submit the cause to the determination of the Court.

VI.

Opinion of the Court below.

In regard to the decision of the Court below on the question of negligence and fault in the conduct of the respective vessels, we are constrained to say that it is apparent, from reading the opinion of the

learned judge, that he not only mistook the force and effect of the proofs, but entirely misapprehended the theory of the defence and the argument with which we enforced it.

We did not then, and do not now, mean to be understood as resting the charge of fault in the *Kate*, upon her failure to obey the rules of the supervising inspectors. On the contrary, we insist that the *Kate* is to be condemned because of what she did, whether in violation of any rule or not, and because what she did do caused the collision.

Our reference to these rules is rather incidental than as forming the basis of our defense; and we cite them as on the one hand confirming the acts of the *Atlas*, and on the other condemning the act of the *Kate*. For we nevertheless most strenuously insist that the *Kate*, in starboarding her helm, violated not only Rule 2, but Article 14 of the Act of April, 1864, also, and is to be also for this reason condemned.

Again, the argument adduced from the "Fifth Situation" is not one presented in support of any theory of our own, but solely to meet a pretense of the libellants, namely, that the vessels approached each other in an "oblique direction." And, for the purpose of the argument, assuming this to be true, conceding that Article 14 does away with the peremptory injunction of this rule, we respectfully insist that in the case presented by the libellant's proofs there is no inconsistency between the Fifth Situation and Article 14. It was alike the duty of the *Kate* to port her helm, and in compliance with Article 14, to "keep out of the way;" for she could keep out of the way only by porting.

And the conclusion of the learned judge, in his review of this branch of the case, namely, that "under these two articles (14 and 18) the responsibility of avoiding the *Kate*, in the present case, was cast

upon the *Atlas*," is, we submit with respect, a palpable error.

It was the *Kate*, if either, which "had the other on her starboard side," and it was, therefore, the *Kate* whose duty it was to keep away. The libellants do not pretend that the starboard side of the *Atlas* was presented to them. And the proofs are conclusive that the *Kate* was discovered off the port bow of the *Atlas*, and would have been kept there but for the two whistles of the *Kate*, and that she was in point of fact kept there until the two whistles and consequent change in the positions brought the starboard bows of the two vessels together at the moment of collision.

We, therefore, insist that upon the view of the situation most favorable to the libellants, Article 14, which directed the *Kate* to keep away, and Article 18, which directed the *Atlas* to keep her course, at the same time condemn the *Kate* and justify the *Atlas*.

Of course, then, the suggestion of the learned judge in regard to the *Atlas*, that "it was a fault in her to port *if starboarding afforded the only opportunity of avoiding the disaster*" (fol. 135), was wholly immaterial in the case before the Court (unless upon the general obligation of Article 20, not, however, invoked by the learned judge, that every vessel shall take all needful precautions to avoid a collision). And more than this, there is not a scintilla of proof that starboarding would have at all availed; on the contrary, the proof is conclusive that porting was not only the proper and safe, but the only practical movement, and that it was the attempt of the *Kate* to force a passage to starboard that occasioned the collision.

The principal object had in view by us in citing the Rules of Navigation, was to show that the *Kate* was in fault in *changing her* course as she did. This, the principal ground of our defense, the learned judge did not consider at all; but, disregarding the question of fault in an attempted

change of course, holds (fol. 135) that "the case cannot be made to turn upon the correctness of the manœuvres of either vessel after they saw each other, *for there was then no time* to make any material change in the course."

It is in evidence, and not denied, that but for "the manœuvres" and signals, contrary to law, of the *Kate*, there would have been no collision, and but for them there was no occasion to change the course of either vessel.

The fact is, that after receiving our whistle to keep to the right, the *Kate* changed her course to the left, throwing herself across our path. Of course there was then no time to change. It was this impracticable movement that we complain of, and that occasioned the collision.

We now come to the ground upon which the learned judge below imputes fault to and bases his decree against the *Atlas*, namely, "the absence of a proper look-out" (fol. 136).

And here we feel compelled to join issue with an apparent tendency of Courts of Admiralty to fasten upon a technical fault, as a violation of some rule of navigation or settled doctrine of the Court, and for that condemn the vessel, without due regard to the question, whether such fault or violation occasioned the damage complained of.

The sound maxim of the Common Law, "*causa proxima non remota spectatur*," seems to be regarded as an intruder in a Court of Admiralty.

A sailing vessel is not to be condemned for not having a full complement of crew, or deficient canvas, when the libellant fails to take proper precautions to avoid her.

A libellant shall not be dismissed for having an incompetent engineer, when in the management of his engine he obeys the orders of his superior officer.

And in the case before us, we do not ask that the *Kate* be condemned because she did not have

proper lights. We make no claim that that had anything to do with the cause of collision.

Nor do we ask that she be condemned because her pilot was not licensed, as the law required (Act of July, 1866, § 9).

We urge the want of lights in support of a general charge of negligent management; and the fact that the pilot was not licensed, with the same object, and to confirm or corroborate our charge, that she fatally blundered in the execution of the pilot's duty.

The learned Judge's conclusion (fol. 135), that the collision was in anywise occasioned or contributed to by the absence of a look-out on the *Atlas*, is purely suppositional, and proceeds upon the assumption that had she had a look-out, the *Kate* would have been earlier discovered; and had she been earlier discovered, the *Atlas* might have done something other and different from that which she did do to avoid the collision.

In answer to this, we insist:

1st. That this view of the case is a fallacious one.

2d. That there is not one particle of proof or ground for the inference that the presence or absence of a look-out could or would have anything to do with the collision which occurred, or the fault which occasioned it; and

3d. That it is conclusively proved that the collision was, in point of fact, induced and occasioned by a needless and culpable act on the part of the *Kate*.

The courses and positions of the two vessels when the *Kate* was discovered, were as follows:

The *Kate* was heading diagonally across the Kills toward a point between Port Johnson and Constable Point, on the Jersey shore, about two-thirds across (Conley, fol. 32; Reed, fols. 36, 41).

The *Atlas* was near the middle of the Kills, heading east by south half south, and discovered the *Kate* off the larboard bow (Durham, fol. 66; Parisen, fol. 83).

They were then nearly "head and head," and little or no change of course in either was necessary to pass in safety. Indeed, it is in evidence, and undisputed, that had they kept on their respective courses, there would have been no collision (Durham, fol. 70; Parisen, fol. 86, and others).

But the *Atlas* immediately ported, thus giving the *Kate* a wider and more than ample berth, and notified the *Kate*, by one whistle, of the intended course. Between this and the collision there was time to port more, throw the wheel hard over, change her course again by starboarding, stop her engines and then back and travel with constantly diminishing speed over between 800 and 1,000 feet (fol. 84. Taylor puts the interval at three or four minutes, fol. 49).

We therefore submit: That the *Atlas* took early and ample precautions to avoid the collision. It would have been her duty to do no more, she could have done no more, however early she had discovered the *Kate*. Because there was not time to counteract the *Kate's* most unexpected blunder, will not condemn the *Atlas*, unless the Court is prepared to say, "your conduct was unassailable, but because when the *Kate* threw herself in your path you could not avoid her, you must pay half the damage!"

And 3d, it is certain that the cause of the collision was the starboarding of the *Kate*—after her location was known to the *Atlas*—and her change of course when she *did* see us, from one which would have carried her safely by, whether she ported or kept simply on, to a position directly across the bows of the approaching steamboat.

We say, then, and confidently, that the presence of a look-out would not have prevented the collision, and the failure of the *Atlas* to earlier discern the *Kate*, or the absence of a proper look-out, in no wise occasioned or contributed to it. Even if the absence of a look-out cast upon the *Atlas* the burthen of showing that the collision was not due to that fact, this burthen has been completely met, and

we regard the question of a look-out, as the question of lights, as wholly immaterial upon the proofs as presented.

This view is not unsupported by authority :

"We do not think it worth while to discuss the question whether the look-out on the schooner was sufficient. If it was not, it can make no difference, for the want of a proper look-out did not contribute to the disaster. If the schooner held her course, it was all that the steamer had a right to require, and, whether she had a proper look-out or not, it was her duty to do precisely what she did."

The *Fannie*, 11 Wallace, 238.

"We are not to shut our eyes and accept blindly an artificial rule which is to determine, in all cases, whether the navigator is liable to the charge of negligence in causing any loss or damage that may happen. * * It is perfectly evident that the absence of a special look-out had nothing at all to do with the happening of the accident, and therefore it can have nothing to do with fixing the liability of the parties."

The *Farragut*, 10 Wallace, 334.

In conclusion, we quote from the opinion of the Court in the case of the *Continental*, 8 Blatchford, 3, in which the facts, as there recited, bear a striking resemblance to the case now before the Court :

"1. When the officers of the *Continental* saw the propeller, they saw her off their own starboard bow.

"2. They also saw her green light and not her red light, until she ported and turned across their course.

From these two facts it is a necessary and inevitable result, that the officers of the *Continental* had no reason to apprehend a collision, and their sheer to the south ward, out of abundant caution, or, as a witness expresses it, "to give the propeller a wide berth," was taking more than ordinary care to be wholly out of reach of danger. These two facts being established, there could be no collision if both vessels kept their course ; and the result is, that the accident was wholly caused by the sudden and unwarranted porting of the propeller, which brought her across the bows of the *Continental*. * * The

vessels were not crossing each others track, but were on lines of perfect safety, and there was no just ground to apprehend collision until the propeller ported. * * By suddenly porting, the propeller defeated the effect of the sheer of the *Continental* to the southward.

VII.

The libel nowhere charges the want of a lookout, or that the want of it contributed to the collision.

The libellant must be bound by its allegations. The Court will not impute or assume fault where none is charged by the allegations of the libel.

This Court will not allow the pleadings to be amended in this Court.

VIII.

The decree of the District Court should be reversed, with costs to these appellants.

APPORTIONMENT.

Suppose this Court shall hold that both steamers were in fault. Then what disposition shall this Court make of the case.

I.

The libellant has failed to make the "Kate" a party to this action, although it appears from the

report of the case that time was given for that purpose by Judge Benedict.

Under well settled principles the claimant of the Atlas could not make the "Kate" a party; it rested with the libellant.

The libellant, having failed to do this, must be held responsible for its own neglect, and can only hold the Atlas for more than one half.

The statute of limitations does not run in Admiralty, and the right of action is perfect on the part of the libellant against the "Kate" at this time.

No laches can be chargeable against the libellant, as the final decree of the highest tribunal can alone fix the status of the two vessels.

Should the Atlas be held liable for the whole, the claimant would be without redress. Being a wrong doer it could not of course compel contribution, especially if this Court should hold that she was a joint wrong doer.

II.

The case fails to show what the pecuniary value of the "Kate" was when the collision occurred. In the absence of any proof to the contrary, this Court will assume that she was able to contribute the above. At any rate under the decision of this Court in the case of the Alabama and other decisions, libellant is bound to exhaust its remedy against the "Kate" before the Atlas can be compelled to pay more than its portion awarded against her.

III.

The libellant, however, stands in no better posi-

tion than the "Kate" herself. It is a *rem* liability and not a personal claim or right.

Had it been decided that the canal boat which held the cargo was in fault, and contributed to the collision, then the decisions are numerous both in the Admiralty Courts of England and in this country.

The reason is an obvious one; the owners of the cargo choose their own boat, they repose confidence in the officers and crew that they will properly conduct the enterprise. This is especially true when they have no motive power of their own and must rely upon other motive power for locomotion.

This falls as much within the scope of the employment of the vessel by the owner of the cargo as would the navigation by sails, if she had them, or steam, if that was her propelling power. This would seem to involve the right within the character of the employment, and the necessities of the vessel, for the master of the canal boat to employ motive power.

This employment would make the motive power as much the agent of the shipper as the canal boat and its crew would be.

It is hard to see where the distinction exists, if there is any.

If these positions are correct, then clearly the cargo holds no better position to the collision than does the "Kate."

Hay *vs.* La Nive 2, Shaw's appeal cases.
The Bonita.
The Alfred.
The Jose Maria, all cited in the Milan, 1st Lushington.
The Hasbrouck, 5 Benedict, 244.

IV.

The power and jurisdiction of the Admiralty are

peculiar, and is nowhere held or possessed by courts of common law jurisdiction.

At common law, contributory negligence defeats the right of recovery. In admirality it only calls upon the Court to apportion the damages between faulty vessels.

This necessity involves the power to declare what vessels are in fault, where the fault lies, and to apportion the damages.

This duty is just as incumbent upon the Court when there is contributory negligence as it is to decide the case at all.

It follows, as an equal necessity, that whether all the vessels are before the Court or not, the power and duty of the Court are equally imperative to declare where the fault lies, and apportion the damages.

From these positions does it not follow that each vessel, whether before the Court or not, is equally bound to bear its share or portions of its burdens.

The libellant cannot shield himself from the consequences of making this vessel a party by claiming that any vessel before the Court may, under certain circumstances, be liable for more than the share or portion which the Court shall decree it must pay.

If the libellant fails to make all vessels which are even remotely chargeable, he does so at his own peril. Time is not an element of excuse. No statute steps in to rob him of his own right.

It would be ridiculous for the Court to hold that twenty vessels were liable to contribute to the payment of the damages, and then say any one of them are compelled to pay for the whole.

Certainly, under the decision of the Washington and Gregory, as well as that of the Alabama, the Court would go no further than to say after you

have exhausted your remedy against any one, you may compel the others to contribute.

V.

The principle of and power of apportionment is peculiar. It is *sui generis* in the Admiralty Courts. It has no recognition in the Courts of common law, and we submit that its fair intent and the principles involed in it make a liability *several* and not joint; were not this so, the whole doctrine must necessarily fall to the ground.

The power to apportion necessarily involves the power to determine the extent of the liability of each. The Court is not bound to apportion equally. It has the power to determine not only who are in fault, but the extent of such fault.

It was the power to decree that the vessels held to be in fault are bound to contribute in different sums; one may be adjudged to pay one-half or one-quarter, another one-third or one-sixth, and so on *ad libitum*. This course is frequently adopted in the decisions of collision causes.

It would seem to be a strange rule that would say the judgment of this Court is, that your guilt in this matter is just one-sixth of the whole damage, and it would at least seem but reasonable that when he has paid the amount the Court has adjudged, he ought to pay even to the pound of flesh, he is purged from his guilt, and yet in the next breath say, "It is true that one-sixth is all that you ought to pay to purge yourself, and it is equally true that the other vessel ought to pay five-sixths, yet if twenty other causes came in the way of its payment, then you must pay the whole," we respectfully submit that such a rule would be arbitrary, harsh and eminently unjust.

Whoever heard of a contribution from a joint trespasser to a co-joint trespasser; and if one hereby is compelled to pay the whole where he is directed to pay only half, he is certainly without remedy. He in no way becomes subrogated to the rights of the libellant, for even the libellant may be his joint wrong-doer.

The acts of Congress having fixed the liability of the owner and limited it to the value of the vessel, there certainly is no greater hardship in giving to the libellant, under the law of apportionment, the same satisfaction. It would certainly be a harder rule under the law of apportionment that when the Court has fixed the extent of his contributory guilt that because his vessel happens to be of greater value than his co-trespasser, that he must also pay for his co-trespasser's guilt and wrongs. This would virtually abolish the law of apportionment, and would bring into force the common law doctrine in full.

This doctrine of apportionment in Admirality is as old as commerce or shipping, and has always been administered upon the practice and idea that it was the province of the Court to determine who were chargeable and the extent of the liability. This makes the law of apportionment a science and a doctrine of common sense; the other view, which holds all liable as joint trespassers, notwithstanding the Court has within the scope of its powers, fixed the limit of the liability of each.

VI.

To return to the particular facts which underlie this case.

The establishment of the law that the Court can only deal with the vessel actually before it, and

hold that vessel alone liable for the whole upon the idea of all being joint trespassers, (a doctrine obnoxious to the Admiralty,) would be to leave the victim entirely in the hands of the Libellant; and if there are really ten vessels who are in fault, it may perhaps be for the reason that the vessel least in fault, because it happens to be the most valuable, or from other more selfish motives even is chosen to proceed against ~~such vessel~~.

This would defeat the whole object and purpose of the law of apportionment.

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Of Counsel.